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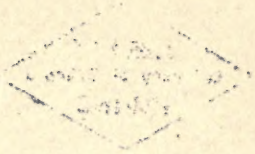
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THE

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CONTAINING THE

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SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

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OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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AMERICAN STATE REPORTS.

VOLUME 110.

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VOLUME 110.

(15)

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

DICKENS v. STATE.

[142 Ala. 49, 39 South. 14.]

APPELLATE PRACTICE.—Bills of Exceptions are Construed most strongly against the party excepting, and if they will admit of two constructions, one of which will reverse and the other support the judgment, the latter will be adopted. (p. 18.)

LARCENY.—Crude Turpentine which has run from the body of the tree above into boxes which were cut into the tree to serve as receptacles is, while in such boxes, the subject of larceny. (p. 19.)

W. L. Lee, for the appellant.

M. Wilson, attorney general, for the state.

50 DENSON, J. The defendant was indicted for the larceny of three gallons of crude turpentine.

E. R. Register, for the state, testified that he owned certain turpentine boxes in Houston county; that the defendant worked some boxes adjoining witness'; that in June, 1903, the defendant and one Ed Ward were on his land; that when witness left for dinner he left some boxes near the line undipped; that when he returned, the boxes had been dipped, and that the gum dipped was worth one dollar and a half; that the defendant was near one box in the attitude of dipping, and witness asked him what he was doing and the defendant walked off. That the defendant in January of 1903, pointed out the line between the boxes and witness' boxes, and that defendant was across the line that he pointed out. That the gum was in the box and the box was a part of the

trees and was cut into the trees that year. The witness was asked, "How do you hold the boxes?" He answered by a lease and the lease is in writing. The defendant moved to exclude the answer on the ground that there was higher evidence of the lease, and that it was incompetent, the court overruled the motion, and the defendant excepted.

It does not plainly appear from the bill of exceptions whether or not the above question was asked by the defendant or solicitor. But it does appear from the bill that the witness had just testified that he held by a written lease and had not the lease present, and on motion of the defendant the court excluded the evidence. Then immediately follows in a separate paragraph in the bill [51] the word "Examination," the question above set out, then the answer of the witness above quoted, and which the court declined to exclude.

"A bill of exceptions is construed most strongly against the party excepting, and if it will admit of two constructions, one of which will reverse, and the other support the judgment, the latter construction will be adopted": McGhee's Case, 52 Ala. 224; 1 Brickell's Digest, 251, sec. 126. A reasonable construction of the bill of exceptions is, that the question was asked by the defendant and the answer which the defendant moved to exclude was drawn out by that question. Adopting this construction, the court committed no error in overruling the motion to exclude the evidence, for the answer given by the witness was directly responsive to the question, and if it should be conceded that the answer was illegal evidence, yet the court was under no duty to exclude it on motion of the party who introduced it: Toiver's Case, 94 Ala. 111, 10 South. 428; Wright's Case, 108 Ala. 60.

Ward, a witness for the state, testified that he and the defendant dipped some boxes where Register testified that defendant dipped; that it was just after dinner; that it was on Mr. Pope's land as witness understood, the land which defendant was working, and that he was hired by the defendant.

The defendant testified that he dipped the boxes, but that they were the boxes of Mr. Pope and he was working the boxes on halves. That he did in January, 1903, point out the line to Register, and he was not over the line so pointed out. That he remained in the woods and dipped the remainder of the day, and that Register also remained and dipped.

One question presented by the affirmative charge is, whether or not crude turpentine which had run from the body of the tree above into boxes which were cut into the tree to serve as receptacles for the turpentine, was the subject of larceny. This identical question has never been presented to this court for decision, but we are relieved of difficulty in the decision of it by the fact that the question was considered by the supreme court of North Carolina, in the case of State v. [52] Moore, 11 Ired. 70, and in what appears to us a well-considered opinion by Ruffin, C. J., the court answered the question in the affirmative. In this opinion the court, after reciting the means by which the turpentine was made to flow, uses this language: "Such being the process in this business, it seems clear that turpentine, when in the boxes in the state to be dipped up, is personalty. It no longer forms a part of the tree, but it exists separate from the tree, and has been separated by a process of labor and cultivation. The box, though in the tree, is but a convenient receptacle for the turpentine, after it has been extracted or has been made to exude from the pores which contained it, while in the tree, as a part of it. When it ceases to be a part of the tree, it necessarily becomes a chattel." This case was reaffirmed and followed in the case of State v. King, 98 N. C. 648, 4 S. E. 44. We think the reasoning employed by the eminent jurist in the case from which the above extract was taken is sound, and that the conclusion there reached is correct. We, therefore, hold that the turpentine was the subject of larceny.

If the defendant at the time he dipped the turpentine did it under the honest belief that it was within Pope's land line, and that it belonged to Pope, then the evil intent which is an ingredient of larceny would have been lacking, but this question the court could not properly take away from the jury, and also the question whether or not, from all the evidence, the taking of the turpentine was done feloniously, notwithstanding the taking might have been openly done, was properly left for the jury to determine: Bonner's Case, 125 Ala. 49, 27 South. 783; Talbert's Case, 121 Ala. 33, 25 South. 690; Dozier's Case, 130 Ala. 57, 30 South. 396. It follows that the charges requested by the defendant were properly refused.

Considering the view we have taken of the case, it is unnecessary to determine whether the charges of defendant were presented as an entirety

No error having been found in the record, the judgment of conviction is affirmed.

McClellan, C. J., Tyson and Dowell, JJ., concurring.

Larceny of Property savoring of realty is discussed in the monographic note to People v. Miller, 88 Am. St. Rep. 590, 591.

EX PARTE STATE EX REL. ATTORNEY GENERAL.

[142 Ala. 87, 38 South. 835.]

OFFICERS DE FACTO Under Unconstitutional Statute.—A person commissioned by the governor as a circuit judge, and exercising the duties of that office under an unconstitutional statute and a void appointment, but at a time when and a place where the circuit court for a particular county could be legally held, is a de facto circuit judge, and his acts as such are as effectual when they concern the rights of third persons or the public as if they were the acts of a de jure officer, until his title to his office is adjudged insufficient. (p. 21.)

OFFICERS DE FACTO—Validity of Acts of.—The acts of a de facto officer are valid in so far as they concern the public or third persons who have an interest in the things done until his title to the office is adjudged insufficient. (p. 22.)

M. Wilson, attorney general, and D. C. Almon, for the petitioner.

88 TYSON, J. This is a petition for a writ of mandamus to the judge of the eighth judicial circuit to require him to restore to the docket of the circuit court of Madison county for trial the case of the State v. Stovall, and to vacate an order made by him striking the indictment from the files of the court.

The action of the judge was predicated upon the theory that the indictment was void because preferred and presented by a grand jury not legally constituted.

It appears from the record that it was preferred by a grand jury organized by Honorable Paul Speake as judge of the sixteenth judicial circuit on the nineteenth day of February, 1904.

The sixteenth judicial circuit and the office of the judge thereof was created by the act of the General Assembly, approved October 12, 1903 (General Acts 1903, p. 566), known as the Lusk bill, which act was in the case of Board of Rev-

enue of Jefferson Co. v. Crow, 141 Ala. 126, 37 South. 469, declared by this court to be unconstitutional.

Confessedly there never existed a sixteenth judicial circuit or the office of the judge thereof; so, then, the [89] question presented is, whether the Honorable Paul Speake was a de facto judge of the circuit court of the state. He was commissioned by the governor and attempted to exercise the duties of the office of circuit judge, it is true, under an unconstitutional act and a void appointment, but independent of the Lusk act there existed the office of circuit judge of the eighth judicial circuit and a circuit court in and for the county of Madison. He was not, it is true, legally judge of that circuit or judge of any other circuit. Had he been he would have been a de jure judge and, of course, the question here presented could never have arisen. We have here then a legally existing office of circuit judge and the duties of that office exercised by a person under the provisions of a statute that is unconstitutional, at a time and place when the court could be legally held.

Where this is the case, the authorities seem to be practically unanimous in holding that such a person is a de facto officer, and that his acts are valid in so far as they concern the public or third persons who have an interest in the things done until his title to the office is adjudged insufficient: 8 Am. & Eng. Ency. of Law, 2d ed., pp. 793, 815, 816 and note 1; also p. 818. See, also, Walker v. State, in MSS., and cases there cited. In other words, the acts of a de facto officer are as effectual when they concern the rights of third persons or the public, as if they were the acts of a de jure officer: See note, 42 Am. Dec. 148.

As said by the supreme court of the United States in Norton v. Shelby County, 118 U. S. 441, 6 Sup. Ct. Rep. 1121: "The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode [90] prescribed by law their title is inves-

tigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.

In Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 579, this doctrine is thus stated: "The principle established by these cases, in regard to the proceedings of officers de facto, acting under color of title, is one founded in policy and convenience, is most salutary in its operation, and is, indeed, necessary for the protection of the rights of individuals, and the security of the public peace. The rights of no person claiming a title or interest under or through the proceedings of officers having an apparent authority to act would be safe, if he were obliged to examine the legality of the title of such office up to its original source, and the title or interest of such person were held to be invalid, by some accidental defect or flaw in the appointment, election or qualification of such officer, or in the rights of those from whom his appointment or election emanated; nor could the supremacy of the laws be maintained, or their execution enforced, if the acts of officers having a colorable, but not a legal, title were to be deemed invalid."

It follows that the indictment is valid and that the order of the judge with respect to it was erroneous.

The writ of mandamus will be awarded as prayed for.

McClellan, C. J., Haralson, Dowdell, Simpson, Anderson and Denson, JJ., concurring.

The Acts of Officers De Facto are invalid where they concern themselves, but valid when they involve the interests of the public and third persons: King v. Philadelphia Co., 154 Pa. St. 160, 35 Am. St. Rep. 817; Magneau v. Fremont, 30 Neb. 843, 27 Am. St. Rep. 436; Oliver v. Jersey City, 63 N. J. L. 634, 76 Am. St. Rep. 228. As to the status of a court, and the effect of its judgments, which has been established by an unconstitutional statute, see the monographic notes to Kelly v. Bemis, 64 Am. Dec. 54; Koepke v. Hill, 87 Am. St. Rep. 178.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY v. VAIL.

[142 Ala. 134, 38 South. 124.]

MASTER AND SERVANT—General Manager Vice-principal. A general manager, having entire charge of the business of the master, is his alter ego, and the master is responsible to other employés for his acts. (p. 25.)

MASTER AND SERVANT—Vice-principal.—If an employé whose negligence is complained of is at the time discharging one of the personal, nondelegable duties which it is the duty of the master to attend to himself, such employé charged with such duties stands in the place of the master, and the latter is liable for his acts. (p. 26.)

MASTER AND SERVANT—Nondelegable Duties.—One of the absolute and nondelegable duties of a master is that of seeing that the number of servants employed is sufficient to prevent each of them from being exposed to that class of risks which results from an inadequacy of the force available for the work in hand. (pp. 26, 27.)

MASTER AND SERVANT—Vice-principal.—An employé delegated by the master with the duty of hiring and discharging servants to perform the work over which he is foreman is the representative of the master in the matter and under obligation to employ servants sufficient to do the work, and failing in this the master is liable therefor. (p. 27.)

NEGLIGENCE—Proximate Cause.—If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote. (pp. 27, 28.)

The following is the first count of the complaint: "The plaintiff claims of the defendant the sum of five thousand dollars as damages for that heretofore on, to wit, the twenty-sixth day of December, 1901, plaintiff was a servant of the defendant in the city of Birmingham, Alabama, and in the course of his employment as such servant, it became and was his duty to assist in unloading long, heavy timber from a certain car then at or near the defendant's round house in said city, and plaintiff avers that defendant negligently failed to provide a sufficient number of men to unload said timbers with reasonable safety, and that by reason of said failure, one of said timbers fell upon plaintiff's feet and mashed, bruised and wounded them so that he suffered great physical pain and mental anguish and his feet were permanently injured, and he was put to great expense for surgical and medical attendance, and medicines in and about attempting to cure said wounds, all to his damage in the sum aforesaid, therefore he sues."

A. G. and E. D. Smith, for the appellant.

N. L. Miller, for the appellee.

137 SIMPSON, J. This was a suit by appellee against appellant for damages from a personal injury received by appellee, while engaged as an employé of appellant, in unloading heavy timbers from a car.

All of the counts of the complaint, except the first (which is set out in the statement of the case) were eliminated. Demurrers were filed to this count which were overruled, and issue was then joined on pleas of the general issue, and contributory negligence. The complaint is clearly based on the common-law liability of the master, and not upon the statute.

The evidence shows that Robert Miller was the foreman, having thirty-five or forty men under him, that he hired and discharged men. That he ordered the men to get in the car and unload, that he left them about an hour before the accident, leaving the three men, plaintiff, Peach and Green on the car, and three on the ground, all engaged in unloading the car.

The plaintiff states that there were eight men engaged in unloading the car first and that Miller took five of them away leaving only three unloading, but he immediately qualified that by stating that three were on the car and three on the ground, all assisting in unloading the car. Plaintiff states that they had handled two large pieces of timber, and when they were unloading the third large one, Green had the crow-bar resting on the top of the side of the car, and while it was in that position, the bar on which the timber was resting slipped out, and the timber fell on plaintiff's feet. That while Miller was there, Green did not appear to give proper attention to his work; that he did not seem to care whether he worked or not. He states that Green could have held the bar horizontally or at a slight angle above horizontal, and in that way would have kept it from slipping. He also states that, when they had eight men, they could just raise the timber up and throw it out by main strength, but that three men could not throw it out that way, but had to lift one end at a time and place it on the skids, and have one to hold that end with the crow-bar while the others moved the other end.

138 It is claimed by plaintiff that Miller was the "vice-principal" in this case, and not the fellow-servant of the

plaintiff, that he was negligent, and, therefore, the master was responsible.

The cases involving the question as to whether an employé is a vice-principal, so as to stand in the place of the master, and be his "alter ego," so that the master is responsible for his negligence, are divisible into two classes, to wit, one in which the representative character is regarded as determinable by the rank which he holds in the master's service, and the other in which his rank is held to be immaterial, and the master is held to be responsible according as the employé was or not deputed to perform those strictly personal duties of the master, variously denominated "absolute," "nondelegable," "nonassignable," or "nontransferable": 1 Labatt on Master and Servant, sec. 150, p. 313.

From an early period in England one current of authorities held that a master who transferred all of his business to a general manager constituted such general manager his "alter ego," and was responsible for his acts of negligence to his servants. But that doctrine was finally repudiated, and the English cases now, following the leading case of Wilson v. Merry, L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T., N. S., 30, hold that the rule that the servant assumes all the risks arising from the negligence of other servants is not subject to any exceptions, the reasoning being that the master cannot be held liable unless he himself has been negligent, that he has not agreed to do the work personally, and, at all events, the servant can choose whether he will serve the master who does all of his own work, or the one who employs others to attend to it: 2 Labatt on Master and Servant, secs. 525, 529, pp. 1484, 1501, and notes.

But in the United States the great weight of authority favors a more liberal policy toward the employé, and it may be stated as the well-established rule in American courts that a general manager, having entire charge of the business of the master, is his "alter ego," and the master is responsible, to other employés, for his acts: Honner v. Illinois C. R. Co., 15 Ill. 550; Washburn v. Nashville etc. [139] R. R., 3 Head, 638, 75 Am. Dec. 784; Lund v. Hersey Lumber Co. (C. C.), 41 Fed. 202; Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521; Brickner v. New York Cent. R. R., 49 N. Y. 672; 2 Labatt on Master and Servant, secs. 527, 530, and notes.

When we get below the position of general manager, there is considerable conflict in the authorities, some not extending

the liability below the general manager, others adopting the superior servant idea, and holding the master responsible for the acts of any servant who holds a position superior to that held by the servant injured, and others holding that it is not a question of the relative grade in the service, but depends entirely on the question as to whether the employé, whose negligence is complained of, is discharging one of those personal, nondelegable duties, which the master must attend to himself, so that any servant charged with these duties stands in the place of the master. This latter is the principle adopted by the supreme court of Alabama: Walker v. Bolling, 22 Ala. 294; Mobile etc. R. R. v. Thomas, 42 Ala. 672; Mobile etc. Ry. v. Smith, 59 Ala. 245; Tyson v. South etc. R. R., 61 Ala. 554, 32 Am. Rep. 8; Postal Tel. Co. v. Hulsey, 115 Ala. 193, 22 South. 854; Georgia Pac. Ry. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47, 9 South. 252.

It is difficult to determine upon what principle the courts have undertaken to determine, without legislative aid, that certain duties are delegable, and others non-delegable, but, so far as the case now before the court is concerned, our own court has made some deliverances which throw light upon the question of liability vel non, under the facts detailed.

Our court has held that one of the absolute, nondelegable duties of the master is the duty of selecting competent employés to manage his business: Walker v. Bolling, 22 Ala. 294; Tyson v. South etc. R. R., 61 Ala. 554, 32 Am. Rep. 8.

It has held also that the master does not guarantee the competency of his employés, but is only responsible for reasonable care in selecting them: Smoot v. Mobile etc. R. R., 67 Ala. 13; Clements v. Alabama etc. Ry., 127 Ala. 166, 28 South. 643.

[140] It has held that neither a conductor, an engineer, nor a superintendent of work is a vice-principal, so as to make the master responsible for his negligence: Georgia Pac. Ry. Co. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47, 9 South. 252; Louisville etc. R. R. Co. v. Allen's Admr., 78 Ala. 494; Woodward Iron Co. v. Cook, 124 Ala. 349, 27 South. 445.

On the other hand, it has held that a yardmaster, who was invested with authority to appoint or remove engineers, was discharging a corporate function, and, consequently, if said yardmaster selected an incompetent engineer, not having exercised ordinary care in ascertaining his qualifications, the

master was liable for any injury which resulted from placing such incompetent man in charge of an engine: Tyson v. South etc. R. R. Co., 61 Ala. 554, 32 Am. Rep. 8.

And in a case where an engineer, in addition to his duties as engineer, was vested with the power to appoint and discharge employés, and an accident occurred, by the train, which said engineer was managing, running into a wash-out, the company was not liable, because he was, at that time discharging his duties as engineer, and the accident was attributable to his negligence in that capacity, and not to his negligence in the selection of employés: Mobile etc. Ry. v. Smith, 59 Ala. 245.

The single count in the complaint, on which issue was joined claimed that the accident occurred by reason of the fact that "the defendant negligently failed to provide a sufficient number of men to unload said timbers, with reasonable safety."

The foreman, Robert Miller, testified that it was a part of his duties to hire and discharge the servants under him.

It is declared, by high authority, in other states that one of the absolute (nondelegable) duties of the master, is that of "seeing that the number of persons employed is sufficient to prevent each of them from being exposed to that class of risks which results from an inadequacy of the force available for the work in hand": 2 Labatt on Master and Servant, sec. 573, p. 1679.

This duty is so near akin to that of selecting competent servants that we hold it to be within the principle heretofore [141] decided by this court, and that Miller, having been delegated by the master with the duty of hiring and discharging servants to perform the work, over which he was foreman, was the representative of the master in that matter and under obligation to employ servants sufficient to do this work. If he had to take some away to perform some other work, he should have employed others, if necessary, to perform this work properly.

There was evidence in the case, from which the jury may have found that the accident resulted from his not having employed a sufficient number of men for the work. Hence there was no error in the refusal of the court to give the general charge requested by the defendant.

The court erred in refusing to give charge No. 7 at the request of defendant. "If an injury has resulted in con-

sequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote'': Louisville etc. R. R. Co. v. Quick, 125 Ala. 553, 28 South. 14; Stanton v. Louisville etc. R. R. Co., 91 Ala. 382, 8 South. 798; Louisville etc. R. R. Co. v. Kelsey, 89 Ala. 287, 7 South. 648; Western Ry. of Alabama v. Mutch, 97 Ala. 194, 38 Am. St. Rep. 179, 11 South. 894, 21 L. R. A. 316; Thompson v. Louisville etc. R. R. Co., 91 Ala. 496, 8 South. 419, 11 L. R. A. 443.

The demurrer to the first count in the complaint was properly overruled: Georgia Pac. Ry. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47, 9 South. 252; South etc. R. R. Co. v. Thompson, 62 Ala. 494; Laughran v. Brewer, 113 Ala. 509, 21 South. 415.

The court erred in overruling objections to testimony, as stated in the second, third and fourth assignments of error. The remarks of the foreman to the fellow-servant were not relevant to the issue involved in the case.

For the errors stated the judgment of the court is reversed, and the cause remanded.

McClellan, C. J. T., Tyson and Anderson, J. J., concurring.

A Master Must Supply a Sufficient Number of Men to accomplish the work he undertakes with reasonable safety to those engaged in the service, and if he fails to discharge this duty, as a result of which an employé is injured, he is answerable to such employé, unless the latter can fairly be regarded as having assumed the risk: Cheeney v. Ocean Steamship Co., 92 Ga. 726, 44 Am. St. Rep. 113; Southwest Imp. Co. v. Smith, 85 Va. 306, 17 Am. St. Rep. 59; Johnson v. Ashland Water Co., 71 Wis. 553, 5 Am. St. Rep. 243; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92.

The Question of Who is a Vice-principal is discussed in the monographic note to Mast v. Kern, 75 Am. St. Rep. 584-640. An employer cannot escape responsibility for the discharge of personal duties which he owes his employés by delegating their performance to another servant, no matter what the rank of such servant may be: See Merrill v. Oregon Short Line R. R. Co., 29 Utah, 264, post, p. 695, and cases cited in the cross-reference note thereto.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY v. HARRIS.

[142 Ala. 249, 37 South. 794.]

NEGLIGENCE.—Evidence tending simply to show that the engine whistle was not sounded nor the bell rung as the train approached a crossing, will not support a charge of wanton, willful, or intentional negligence on the part of the railroad company. (p. 30.)

RAILROADS—Trespassing Infant.—A child, incapable by reason of tender age, from exercising discretion, or of being guilty of contributory negligence, may become a trespasser upon a railroad track upon the same facts that would impress that character upon a person of legal discretion. (p. 30.)

RAILROADS—Trespassing Infant.—If an infant, one and one-half years of age, goes upon a railroad track at a crossing, and, seeing a train approaching, turns up the track, stops, and stands gazing at the train, such child becomes a trespasser upon the track, and the railroad company owes it no other duty than to resort to all reasonable means to avoid injuring it after the railroad servants become aware of the presence of the child, and of its peril. (p. 30.)

RAILROADS—Trespassing Infant.—If an infant trespasser upon a railroad track would not have heeded signals of warning if they had been given at a crossing, a failure to give them does not render the railroad company liable for injury to such trespasser. (p. 31.)

O. R. Huntley, for the appellant.

McCord & McCord and J. A. Lusk for the appellee.

252 McCLELLAN, C. J. We deem it unnecessary to consider whether the first count of the complaint sufficiently charges willful wantonness or the like, since, assuming that it does, we are of opinion that no evidence was adduced on the trial tending to prove such charge. The only eye-witnesses to the occurrence were the fireman and the engineer. They each testified that as soon as the child was seen by them or either of them approaching the track, the track was sanded, the brakes were applied and the engine was reversed—that, in short, everything possible to be done to stop the train before it reached the point where the child came upon the track was promptly done. The speed of the train considered with reference to the place of the accident afforded no basis for an inference of willful, wanton, or reckless misconduct on the part of the engineer. Even if the declaration which the witness Hooper testified the engineer, Lane, made in his presence to the effect that he saw the little child when he was two or three hundred yards away from it, but thought it was a

goat, be regarded as evidence in the case for any other purpose than the impeachment of the testimony of Lane given on the trial—which it is not (1 Greenleaf on Evidence, sec. 461f)—it has no legitimate tendency to show that Lane willfully ran against the child, or acted wantonly toward it, or was recklessly indifferent to its safety. There was some evidence tending to show that the whistle was not sounded nor the bell rung as the engine approached the crossing, [253] but this imported nothing beyond simple negligence on the part of the enginemen; standing alone it afforded no predicate for an inference of willfulness or wantonness on their part. The affirmative charge requested by the defendant against the first count should have been given.

All the evidence goes to show that the little child—a toddling baby nineteen months old—came on the track at the crossing and, seeing the train, turned up the track and after going several feet away from the crossing, stopped and stood looking at the approaching engine. Probably so far as she was capable of intention, the child's purpose when it came onto the track was to cross over and beyond it along the road, and it was open to the jury to so find in line with the averment of the complaint in this connection. But her subsequent course made her a trespasser on defendant's track—none the less so by reason of her tender age, for though she could not be charged with contributory negligence, she may be a trespasser upon the same facts that would impress that character upon a person of legal discretion—and being a trespasser the defendant, from the time she became one, owed her no duty other than to resort to all reasonable means to avoid injuring her after it—i. e., its servants, became aware of her presence and peril. The evidence without conflict showed that this duty was performed by the enginemen; that they did all that was possible to do to stop the engine before striking her.

There was a tendency of the evidence, as we have seen, to show that the statutory signals for the crossing were not given. If there was any room on the evidence for the jury to find that she would not have come upon the crossing had these signals been given, the injury might be ascribed to their negligent pretermission. The jury might have concluded that she was injured in consequence of the failure to give these signals and found against the defendant on that ground, though satisfied that the trainmen were not at fault after she

came on the track. But it is not our opinion that there was any thing in the evidence to justify such conclusion. To the contrary, the evidence shows affirmatively that the child [254] had not the least appreciation of the danger of going on the track, that her knowledge of the approach of the train, assuming even that she was capable of such knowledge, made no impression of danger whatever upon her—after seeing she walked toward it, and then stopped, gazing at it from a position in the middle of the track—and a finding that she would have heeded the warning of the crossing signals, had 'h been sounded, and kept off the track, is not only unwarranted by the evidence, but would be distinctly opposed to every manifestation the circumstances afforded. To say the least, such a conclusion would be pure speculation and conjecture unsupported by any evidence. Hence our further conclusion that the affirmative charge requested against those counts of the complaint which charged negligence on the part of the defendant's servants should have been given: The injury is not shown to have resulted from the only negligence of which there is any evidence.

We deem it unnecessary to discuss other rulings presented by the record.

Reversed and remanded.

Tyson, Simpson and Anderson, JJ., concurring.

A Child Non Sui Juris may Become a Trespasser on a railroad track to whom the railway company owes no duty, except to use every effort to avoid injury to it after discovering its presence and danger: See Baltimore etc. Ry. Co. v. Bradford, 20 Ind. App. 348, 67 Am. St. Rep. 252; note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 421.

SOUTHERN RAILWAY COMPANY v. LOCKWOOD MANUFACTURING COMPANY.

[142 Ala. 322, 37 South. 667.]

RAILROADS—Demurrage.—A railroad company may lawfully charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled, and the carrier has a lien for such demurrage charges on the property contained in the cars. (p. 34.)

RAILROADS—Demurrage—Delivery.—If a railroad company has placed a loaded car on its "team track" for the purpose of being unloaded by the consignee within a fixed time, this is not such an absolute and unqualified delivery of the contents of the car into the possession of the consignee as will cut off a future right of lien thereon for legitimate charges for car service or demurrage subsequently accruing through the failure of the consignee to unload the goods within the time fixed. (p. 34.)

J. Weatherby and J. T. Stakeby, for the appellant.

White & Howze, for the appellee.

329 DOWDELL, J. The evidence in this case upon the principal issue involved is practically without dispute. The reasonableness of the railway company's rules which were adopted by the Alabama Car Service Association relative to demurrage charges on its cars, and the time limit in the placing of its cars for unloading, and the unloading of the same, by the consignee, etc., as shown by the evidence, seems not to have been denied or questioned.

We concur in the statement made by counsel for appellees in their brief that the only question in this case necessary to be considered is whether the appellant had released its lien upon the lumber by placing the car on the "team track" for the purpose of being unloaded. The proposition seems quite clear that if the appellant railway company had no lien upon the lumber, then in removing the car with the lumber on it and holding the lumber for the purpose of enforcing a pretended lien, it, the railway company, would be guilty of a conversion. This, we understand, is not controverted by counsel for appellant.

The contention of the appellee is that by placing the car of lumber on the "team track" to be unloaded by the consignee was a delivery of the lumber to the consignee, and such a delivery of possession of the property as amounted to a release of whatever lien the railway company had on the lum-

ber. It is not denied that the railway company, as a common carrier had a lien on the lumber for transportation charges, and for the demurrage charges, which had accrued after notice to the consignee of the arrival of the car of lumber, under the company's rules. Indeed, this question is not involved, as the undisputed evidence shows that the charges had been paid by the consignee, when the car was placed on the "team track" to be there unloaded by the consignee. And it was at this time that the appellee, who was the consignee, claims that the lumber was delivered by, and passed from the possession of, the railway company into its possession, discharged of all antecedent liens and not [330] subject to any subsequent lien. It is not denied that the car remained upon the "team track," where it had been placed by the railway company for the appellee's convenience in unloading the same, for the "time limit" allowed by the rules of the railway company, and that the demurrage for which a lien is claimed accrued after the expiration of the "time limit" for unloading. As stated above, the reasonableness of the rule as to "time limit" and "demurrage" charges is not questioned, nor is it denied that the appellee had notice of such rule. The question then is, whether a lien on the lumber remaining on the car arose in favor of the railway company for demurrage accruing subsequent to the delivery in the manner stated, and after the expiration of the "time limit" for unloading the car.

Leading up to the proposition, it may be stated that this court has held that a rule of a railroad company that a party to whom freight is consigned must receive the same within forty-eight hours after notice, is a reasonable one, and a charge for storage after that time is legal: Gulf City Construction Co. v. Louisville etc. R. R. Co., 121 Ala. 621, 25 South. 579.

And it may be said, as a corollary to this, a railroad company may legally charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled: Miller v. Georgia R. R. etc. Co., 88 Ga. 563, 30 Am. St. Rep. 170, 15 S. E. 316, 18 L. R. A. 323. See, also, 20 Am. & Eng. R. R. Cas., N. S., 450, where will be found a collation of authorities on the question. It is a well-settled proposition of law that a warehouseman has a lien for his charges: Steinman v. Wilkins, 7 Watts & S. 466, 42 Am. Dec. 254, and note on page

257; 28 Am. & Eng. Ency. of Law, 1st ed., p. 663. It is equally well settled that where a common carrier, after the arrival of freight, gives notice to the consignee and places the goods in its warehouse, its liability thereafter is that of a warehouseman: Collins v. Alabama Great Southern R. R. Co., 104 [331] Ala. 390, 16 South. 140. And the carrier is entitled to additional compensation for its services as warehouseman: Gulf City Construction Co. v. Louisville etc. R. R. Co., 121 Ala. 621, 25 South. 579.

It would seem if the carrier can make an additional charge when it stores the goods in its warehouse and have a lien for such charge, upon like principle and for the same reasons, it may make an additional charge and have a lien therefor when the goods remain in its cars after its liability as a common carrier has ceased: Miller v. Georgia R. R. etc. Co., 88 Ga. 563, 30 Am. St. Rep. 170, 15 S. E. 316, 18 L. R. A. 323; Miller v. Mansfield, 112 Mass. 260; New Orleans etc. R. R. Co. v. George, 82 Miss. 710, 35 South. 193.

In Miller v. Georgia R. R. etc. Co., 88 Ga. 563, 30 Am. St. Rep. 170, 15 S. E. 316, 18 L. R. A. 323, it was said, "We do not think it material, as affecting the right to make a charge of this character, that the goods remain in the cars, instead of being put into a warehouse." And in the case of New Orleans etc. R. R. Co. v. George, 82 Miss. 710, 35 South. 193, it is said: "There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent unfair advantage, and would breed a multiplicity of suits."

The foregoing authorities fully sustain the doctrine of the right of the carrier to a lien upon the goods transported for demurrage charges. Coming, then, to the main question in the case before us, was the placing of the car of lumber on the "team track" of the railway company for the purpose of being unloaded by the consignee, such an absolute and unqualified delivery of the lumber into the possession of the consignee as would cut off any future right of lien for legitimate charges for car service, or demurrage, subsequently accruing? We think not. The delivery of the possession of the lumber, in the manner in which it was made, and under all the conditions and circumstances, was a qualified delivery. The delivery was conditioned upon the lumber being unloaded from

the car within a fixed time, and upon a failure of the consignee to comply with this condition additional rights [332] and liabilities between the parties arose. The right of the consignee's possession of the lumber was accompanied with the duty on his part to remove the same from the car. It would hardly be contended that the placing of the car for the purpose of unloading terminated all liability of the railway company both as a carrier and warehouseman while the lumber yet remained on its car. Upon the same principle that a railroad company, when its relation becomes that of a warehouseman, has a lien upon goods for storage charges, it has a lien upon goods for demurrage, or car service. A contrary doctrine would defeat the purpose of the rule of the Car Service Association adopted by the railroads, and which was made in the interest of commerce generally, and for the benefit of shippers as well as carriers.

The indefinite detention of cars by shippers would naturally tend to impair the ability of the carrier to meet the demands of commerce, and lessen the facility of transportation.

The case of Lane v. Old Colony etc. R. R. Co., 14 Gray (Mass.), 143, is somewhat similar in principle to the case in hand. In that case the railroad company had placed a shipment of coal in a bin on the company's ground to be removed by the consignee, and after a part had been hauled away, the consignees refused to pay the freight and storage charges. It was held that the railroad company still had a lien on the coal which had not been hauled away for such charges. We think in principle there can be no difference between a delivery of the coal in a bin to be taken and hauled away by the consignee, and a delivery of the lumber on the car on the railway company's "team track" for a like purpose.

Our conclusion is, that a lien for the subsequent charges for car service attached to the lumber in favor of the railway company. The evidence being without conflict, the trial court erred in refusing the general charge [333] requested by the defendant. And for this error the judgment will be reversed and the cause remanded.

McClellan, C. J., Haralson and Tyson, JJ., concurring.

The Right of a Common Carrier to a lien for demurrage charges is denied in the recent case of Nicolett Lumber Co. v. People's Coal Co., 213 Pa. St. 379, post, p. 550.

CARTER v. SMITH.

[142 Ala. 414, 38 South. 184.]

EJECTMENT Based on Sheriff's Deed.—To authorize a recovery on a sheriff's deed in an action of ejectment, there must be a valid judgment, execution, levy, sale and deed, and the plaintiff must also show that the judgment defendant under whom he claims had an estate or interest in the lands which was subject to levy and sale. (p. 36.)

JUDGMENTS Nunc Pro Tunc—Execution.—If a judgment has been amended nunc pro tunc, an execution issued thereon properly recites the date of the original judgment as the date of the rendition of the judgment on which the execution was issued. (p. 37.)

MORTGAGES—Assignment—Erasure of Assignment and Redelivery.—If a mortgagee assigns his mortgage by indorsing the assignment on the back thereof, and having it acknowledged before a notary, the subsequent erasure of such assignment and redelivery of the mortgage to the mortgagee does not reinvest the title in him, and it remains where the assignment has placed it. (p. 38.)

EJECTMENT—Purchaser of Equity of Redemption.—As against the mortgagor, the purchaser of the equity of redemption at sheriff's sale may maintain ejectment, and the mortgagor is not permitted to set up an outstanding title in the mortgagee to defeat the action. Such action cannot be maintained against the mortgagee. (p. 39.)

EJECTMENT—Evidence.—In an action of ejectment by a purchaser at sheriff's sale against one claiming under a mortgage, evidence is admissible to show that whatever title the defendant in execution had it passed from him before the levy and sheriff's sale under the execution, and this although the mortgage was assigned to a third person after the suit was commenced which culminated in the judgment upon which the execution issued. (p. 39.)

G. R. Farnham and J. F. Jones, for the appellant.

[416] DENSON, J. "To authorize a recovery on a sheriff's deed in an action of ejectment, there must be a valid judgment, execution, levy, sale and the deed." It must also be shown by the plaintiff that the defendant in judgment, to whose title plaintiff claims to succeed has an estate or interest in the lands which was subject to levy and sale: Carrington v. Richardson, 79 Ala. 101; Mickle v. Montgomery, 111 Ala. 415, 20 South. 441, and authorities there cited.

In this case the plaintiff, Mary R. Smith, offered in evidence a judgment which was rendered by the circuit court of Conecuh county, on the ninth day of October, 1901, in favor of W. E. Smith, against A. R. Carter & Co., and in connection with the judgment a motion made by plaintiff in the judgment, at the spring term, 1902, of said court, to amend the judgment nunc pro tunc, and also the judgment of the court rendered

at the spring term, 1902, on said motion purporting to amend the judgment. This record evidence was introduced without objection. Plaintiff then offered as evidence an execution on the judgment which bears date of issuance April 22, 1902. To this execution as evidence the defendant objected upon the ground that it showed that it was issued on the original judgment obtained in October, 1901, and not on the judgment as amended at the spring term, 1902.

"The object of a judgment nunc pro tunc is not the rendering of a new judgment, but only placing in proper form on the record the judgment that had been previously rendered. Hence, for many purposes, such judgments are made to relate to, and take effect from, the time when the judgment was erroneously (originally) rendered." In this case we think the execution properly recited the date of the original judgment as the date of the rendition of the judgment on which it was issued. The objection was properly overruled: Dumas v. Hunter, 30 Ala. 188; Wilmerding v. Corbin Banking Co., 126 Ala. 268, 28 South. 640.

417 The execution was levied by the sheriff on the lands described in the complaint, as the property of A. R. Carter, and after advertisement, sale was made of the property to satisfy the execution. At the sale the plaintiff, Mary R. Smith, became the purchaser, and the sheriff executed her a deed to the property which deed was offered in evidence. Plaintiff then offered in evidence a deed from H. S. Derby and Jennie Derby to A. R. Carter, the defendant in execution to the lands sued for; the deed bears date December 24, 1898, and was recorded in the office of the judge of probate of Conecuh county, the twentieth day of August, 1901. There was proof that A. R. Carter went into possession of the property conveyed by the deed about the 1st of January, 1899, and remained in possession several years.

The proof of the defense showed that the defendant, George M. Carter, was in possession of the land sued for at the time the suit was commenced, and that his codefendants, who were his father and mother, lived with him on the land, that he went in possession in November, 1901, and had been in continuous possession since that date. After proving its execution, the defendant, George M. Carter, offered in evidence a mortgage covering the premises sued for, executed by A. R. Carter to him on the fourteenth day of September, 1901. This mortgage was recorded in the office of the judge of pro-

bate of Conecuh county on the seventh day of October, 1901. The law day of the mortgage was October 1, 1901. It was shown that A. R. Carter was in possession of the property when he executed the mortgage, and that he delivered the possession to George M. Carter about November 1, 1901. There was proof of the consideration of the mortgage.

This mortgage was assigned by the mortgagee to J. F. Jones on December 11, 1902, and the assignment was indorsed on the back of the mortgage, and was duly acknowledged by the mortgagee before a notary public. The mortgage with the assignment as written and executed was delivered by the mortgagee to J. T. Jones, and undoubtedly passed the title that the mortgagee had in the lands to the assignee. Jones testified that in December, 1902, he had some claims amounting to several hundred [418] dollars, for collection against George M. Carter and agreed with Carter that if he would secure him he would advance him the money to pay the claims, and that in accordance with the agreement the assignment of the mortgage was made by Carter and the mortgage was delivered to him (Jones). That after the mortgage was delivered, but before Jones had let Carter have any money, Carter came to him and paid the claims off and that he then turned the mortgage back to Carter. He further testified that he made the erasure on the assignment. It appeared that the name of the assignee had been erased. Jones testified that he never reconveyed the property to Carter. The erasure of the name of the assignee and the delivery of the mortgage back to Carter did not have the effect to reinvest the title in him, but the title rested where the assignment placed it: Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117, 90 Am. St. Rep. 22, 30 South. 466.

It has been observed that the execution offered in evidence was issued and levied after the execution by A. R. Carter of the mortgage to George M. Carter and after the law day of said mortgage, and after the possession had been delivered to George M. Carter under the mortgage. At the time the levy and sale was made, the defendant in execution had only an equity of redemption. This by express provision of the statute (Code 1896, sec. 1890), was subject to levy and sale under execution, and while under the statute the purchaser is subrogated to all the rights of the defendant, by the same statute he is subject to all his disabilities.

As against the mortgagor the purchaser of the equity of redemption at sheriff's sale may maintain ejectment, and the mortgagor will not be allowed to set up an outstanding title in the mortgagee to defeat the action. But the action could not be maintained against the mortgagee: Cotton v. Carlisle, 85 Ala. 175, 7 Am. St. Rep. 29, 4 South. 670; Marks v. Robinson, 82 Ala. 69, 2 South. 292.

Under the evidence, the plaintiff, at the commencement of this action, as against the defendant, George M. Carter, neither had the title nor the right to the possession, [419] hence he was not entitled to recover: Confer v. Schening, 98 Ala. 338, 13 South. 123; 2 Brickell's Digest, p. 324, sec. 27.

The defendant Carter went into possession under the mortgage and held under it, and it was competent evidence to show that whatever legal title A. R. Carter owned had passed from him before the levy and sale under execution notwithstanding the mortgage was assigned to Jones, it having been assigned after the suit commenced: New England Mortgage Security Co. v. Clayton, 119 Ala. 361, 24 South. 362; Price v. Cooper, 123 Ala. 392, 26 South. 238.

We have, in our consideration of the case, assumed that the mortgage was valid; at least under the evidence, the court could not as matter of law instruct the jury that it was invalid.

From the foregoing it follows that the court erred in giving the affirmative charge for the plaintiff and the judgment of the circuit court must be reversed.

Reversed and remanded.

McClellan, C. J., Haralson and Dowdell, JJ., concurring.

The Entry of Judgments Nunc Pro Tunc is discussed in the monographic note to Ninde v. Clark, 4 Am. St. Rep. 828-834. The power is inherent in courts of law and equity to make entries of judgments or decrees in proper cases and in furtherance of the interests of justice: See Stern v. Bennington, 100 Md. 344, 108 Am. St. Rep. 433, and cases cited in the cross-reference note thereto.

KAUFMAN v. RICHARDSON.

[142 Ala. 429, 37 South. 673.]

JUDGMENTS—Actions upon.—An action may be maintained upon a judgment before the expiration of the time after the rendition of such judgment within which an execution could be issued to enforce it. (p. 40.)

Abrahams & Simon, for the appellant.

McDaniel & Powell, for the appellee.

432 DOWDELL, J. The action in this case was commenced in the justice court, and was brought on a judgment which the plaintiff had recovered against the defendant in another different justice court. The present case was carried into the circuit court by the statutory writ of certiorari. In the latter court a demurrer was sustained to the complaint, and the plaintiff declining to further plead, a judgment was rendered on the demurrer in favor of the defendant, and from this judgment the plaintiff prosecutes this appeal.

Among other things, the demurrer, which was sustained by the circuit court, challenged the sufficiency of averments in the complaint. The demurrer in this respect was bad. The complaint contained every essential averment in a suit on a judgment: Andrews v. Flack, 88 Ala. 294, 6 South. 907.

The main and important question presented by the demurrer, and insisted on in argument, is, whether an action can be commenced on a judgment within a year and a day, or in other words, before the expiration of the time after the rendition of the judgment, within which an execution could be issued on the same. A similar question was considered by this court as far back as 18 Ala., in Kingsland v. Forrest, 519, 52 Am. Dec. 232. In that case the question was, whether an action of debt would lie in this state on a judgment, rendered more than a year and a day, but less than ten years from the institution of the suit, and on which execution had issued within a year and been returned no property found. After a review of the authorities, the conclusion was reached, that in such a case the action would lie. In that case, in the opinion by Dargan, C. J., it is said that the decided weight of American authority is that debt will lie on the judgment within the year and a day. This seems sound doctrine, and we are unable to see any good reason for a contrary view. It is a

logical sequence to the conclusion reached in Kingsland v. Forrest, 18 Ala. 519, 52 Am. Dec. 232. In that [433] case, the plaintiff having taken execution on his judgment within the year, had his right to another execution at the time suit was brought, just as much as the plaintiff who sues on the judgment within the year from its rendition, that being the time within which execution may issue. The judgment is in the nature of a contract, and the obligation is on the defendant to satisfy it from the time of its rendition if not legally stayed, and it is due from that time. It is no argument to say that the plaintiff should not be permitted to oppress the defendant with the costs of another suit on the judgment, and a complete answer is, that the defendant may avoid this by satisfying the judgment.

In Field v. Sims, 96 Ala. 540, 11 South. 763, it was said: "The weight of authority is in favor of the view that an action can be maintained on the judgment, although the time has not expired in which, under the common law, an execution could issue to enforce it": 12 Am. & Eng. Ency. of Law, 149. Furthermore, it was said in Kingsland v. Forrest, 18 Ala. 519, 52 Am. Dec. 232: "The remedy given by the statute is cumulative merely, and a plaintiff may, if his judgment be not satisfied, sue in debt upon it, although he could, under the statute, issue an alias execution." In Field v. Sims, 96 Ala. 540, 11 South. 763, which was an action on a judgment obtained before a justice of the peace, it was held that the statute of limitations began to run from the date of the rendition of the judgment. And this could not be unless the right of action, since the statute of limitations, as a rule, only commences to run from the accrual of the right of action: See, also, Marx v. Sanders, 98 Ala. 500, 11 South. 764.

Our conclusion is that the circuit court erred in sustaining the demurrer to the complaint, and for this error the judgment must be reversed.

Reversed and remanded.

McClellan, C. J., Haralson and Denson, JJ., concurring.

An Action on a Judgment lies, according to the weight of authority, as soon as it is rendered, or although it is enforceable by execution: See Citizens' Nat. Bank v. Lucas, 26 Wash. 417, 90 Am. St. Rep. 748, and cases cited in the cross-reference note thereto. However, it has been affirmed that a judgment creditor cannot maintain an action upon his judgment without showing some advantage to be gained thereby; but if it be made to appear that a second judgment may in

any respect be more available than the first, the action should be allowed: Stevens v. Stone, 94 Tex. 415, 86 Am. St. Rep. 861. And it has been held that an action cannot be maintained on a judgment while an execution is in the hands of an officer and a levy thereunder remains undisposed of: Thatcher v. Lyons, 70 Vt. 438, 67 Am. St. Rep. 677.

HUMPHRIES v. ADKINS.

[142 Ala. 517, 38 South. 840.]

EQUITY—Judgment at Law as a Bar.—A defendant in a suit at law having only a purely equitable defense to the cause of action is not barred of his equity by the mere fact that he defers filing his bill until judgment has been entered against him at law. Such delay in seeking equitable relief is not laches. (p. 43.)

On January 18, 1904, T. B. Sparks, acting as the duly appointed executor with letters testamentary annexed of the estate of Manuel Adkins, deceased, under a petition duly granted and order duly made by the probate court, sold the land belonging to the estate and involved in this suit to the appellant, J. H. Humphries. On January 30, 1904, the sale was confirmed, and a deed made to Humphries by Sparks, as executor. Some time in January, 1904, the validity of the will was attacked by David and Josie Adkins, the appellees, and was on, February 27th, by the city court of Anniston decreed to be null and void and the probate of such will together with the proceedings thereunder was set aside.

On the seventh day of March, 1904, the appellees brought ejectment against the appellant for said land and on June 23, 1904, a judgment was obtained by them awarding them the lands. Thereupon Humphries filed a bill in the present suit praying for an injunction restraining the appellees from the further prosecution of the ejectment and from the enforcement of the judgment therein. A temporary injunction was issued. Appellees demurred to the bill upon the ground that the appellant waited too long before filing it, in that he had allowed the ejectment suit to proceed to judgment without application for equitable intervention. Appellees also moved to dismiss the bill for want of equity and to dissolve the injunction. The lower court sustained the demurrer and granted the motion to dissolve the injunction. Humphries appealed.

Blackwell & Agee, for the appellant.

McCarty & Merrill, for the appellees.

519 SIMPSON, J. The motion to dissolve the injunction, and the decree sustaining said motion seemed to have been based on a remark in the case of Hooper & Nolen v. Birchfield, 138 Ala. 427, 35 South. 351, to the effect that "A defendant having equitable defenses to an action a law, of which he is at the time apprised, should not wait until such suit has proceeded to such 520 judgment before applying to a court of equity for relief by injunction." This remark was not necessary to the decision of that case, and to that extent the case is overruled.

This question had previously received careful consideration by this court, and it was held that "a defendant in a suit at law having only a purely equitable defense is not barred of his equity by the mere fact that he defers filing his bill until judgment has been entered against him at law": Stevens v. Hertzler, 114 Ala. 564, 22 South. 121.

The judgment of the court is reversed and the cause remanded.

McClellan, C. J., Tyson, Dowdell, Anderson and Denson, JJ., concurring.

Authorities in Support of the Principal Case will be found in the monographic notes to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 224; Payton v. McQuown, 53 Am. St. Rep. 450.

CITY COUNCIL OF MONTGOMERY v. KELLY.

[142 Ala. 552, 38 South. 67.]

MUNICIPAL CORPORATIONS—Ordinances—License for Issuing Trading Stamps.—A city ordinance requiring each merchant within the city issuing any trading stamps, in connection with his business, to pay a license of one hundred dollars therefor, and fixing a like penalty for each stamp issued without having taken out such license, is unconstitutional and void as a palpable attempt, under the guise of a license tax, to fix a penalty for conducting a lawful business in a certain way. (pp. 48, 49.)

R. Rushton, for the appellant.

Hill, Hill & Whiting, for the appellee.

554 SIMPSON, J. As shown by the agreed statement of facts set out in this case, the ordinance of the city of Montgomery provided a regular license for wholesale and retail merchants, the amount of the license fee in each case being regulated by the amount of the stock of merchandise carried by the merchant, and by another ordinance (section 905) provided that each person, firm or corporation engaged in any business for which a license is required and failing to pay said license should be fined not less than ten nor more than one hundred dollars.

Subsequently the city council passed another ordinance, fixing a license fee of one thousand dollars on trading stamp companies (described in the statement of facts), and, later on, another ordinance requiring each merchant who shall issue any trading stamps in connection with his business to pay "a license tax of one hundred dollars," and fixing a penalty of one hundred dollars for each stamp issued without said license. The defendant was tried for this last-named offense, admitted the issuing of the stamps, and, on the written request of the defendant, the judge of the city court gave the general charge in favor of the defendant, the jury returned a verdict of not guilty, and the city council brings the case to this court by appeal.

The license of occupations originated in the exercise of police power, by the state and municipalities, and when a license is issued for police purposes, it must be used as a means of regulation only and cannot be used as a source of revenue, and in the case of useful trades, it cannot exceed the amount of the expense of issuing and a reasonable compensation for the expense of municipal supervision: Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85.

555 Yet a custom has grown up, until it is recognized as one of the powers of legislative assemblies to require a license tax of all persons, firms and corporations, pursuing various business callings, and it is called a privilege tax, and is held not to be subject to the constitutional limitations, either as to amount or uniformity. Yet this does not mean that the power to require a license tax has no rule or limit for its guidance. Although the state may select certain occupations and require those who engage in them to pay a license tax, while those who engage in other occupations are not so required, yet it cannot make a classification which is arbitrary and has no just or reasonable basis: Judson on Taxation, sec.

459. "Discrimination between members of the same natural class have been uniformly condemned": Judson on Taxation, sec. 459.

It has been said that a license tax is "either a license, strictly so called, imposed in the exercise of the ordinary police power of the state, or it is a tax, laid in the exercise of the power of taxation," also that "the pursuit of the ordinary callings of life can only be so far restrained and regulated as such restraint and regulation may be required to prevent the doing of damage to the public, or to their persons": Tiedeman's Limitations of Police Power, p. 273.

It is sometimes difficult to determine with accuracy whether a given enactment provides for a license as a police measure, or authorizes it simply as a privilege tax on certain occupations, though it is often important to determine this question, in order to properly pass upon the validity of the law; for the distinction is clearly recognized, and it is also recognized that the amount which may be fixed for a license under the police power is limited, as shown in a previous part of this opinion, while a wider latitude is allowed when it is a revenue measure, and this court has decided that where power is granted to a municipal corporation to license for police purposes merely, it cannot be used as a source of revenue: Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85.

And the courts now recognize the right to so combine the police regulations and the taxing power as to levy a [556] license tax to discourage and even break up a business: Cooley on Taxation, 2d ed., p. 20.

But this applies only to those lines of business which, while they are tolerated, are recognized as being hurtful to public morals, productive of disorder, or injurious to public: Tiedman's Limitations of Police Power, pp. 273, 277, 278; 21 Am. & Eng. Ency. of Law, 2d ed., p. 778.

Without entering into the various definitions which have been given, in order to distinguish between a license which is strictly a police regulation, and one which is simply a privilege tax on the occupation, we think it is safe to say that, in this case, there can be no license tax imposed except one which is simply a privilege tax on the business. Not only does the ordinance itself fail to provide for any regulations which would indicate an exercise of the police powers, but the character of the business shows it to be one of the legitimate and useful lines of trade, which neither the state nor the munici-

pality can subject to police regulations, with any color of reason.

Then the question arises, Can the law-making department of the government, in providing for privilege occupation taxes, make such discrimination between parties engaged in like lines of business as to place additional burdens on one, which place him, to that extent, at a disadvantage, as compared with the others?

It is not disputed that the legislative department has the right to select what occupations shall bear a license tax and what one shall not, and it must be left to its discretion as to what is equal and right in that matter, and it is also admitted, as before stated, that by reason of the fact that this is not strictly speaking a tax on property, it does not come within the letter of the constitutional provision which requires that "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property" (Const., sec. 211), and while it may be said that this constitutional provision indicates a general purpose in the constitution to provide absolute uniformity in matters of taxation, and to that extent may be looked to in construing other provisions, yet without the aid of other provisions and principles of law it is not controlling in this case.

557 In commenting on this constitutional provision this court has said: "So long as the burden falls with equal weight upon every member of a given class, natural and artificial alike, it is difficult to formulate an argument that such levy violates any provision of our own or of the federal constitution": Quartlebaum v. State, 79 Ala. 4.

And in another case, in which it was decided that this and another similar provision did not apply to a privilege tax required of corporations, Brickell, C. J., said: "We may concede that, when a tax is imposed on avocations or privileges, or on the franchises of corporations it must be equal and uniform. The equality and uniformity consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed": Phoenix Carpet Co. v. State, 118 Ala. 151, 152, 72 Am. St. Rep. 143, 22 South. 627.

As a constitutional warrant for this expression of the chief justice, our constitution provides that among the inalienable rights of every citizen "are life, liberty, and the pursuit of happiness": Ala. Const., sec. 1; also "that the sole object and only legitimate end of government is to protect the citizen in

the enjoyment of life, liberty and property, and, when the government assumes other functions it is usurpation and oppression": Ala. Const., sec. 35.

While the fourteenth amendment to the constitution of the United States prohibits a state from making or enforcing "any law which shall abridge the privileges or immunities of citizens," etc. The supreme court of the United States has declared that "the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations": Lawton v. Steele, 152 U. S. 137, 14 Sup. Ct. Rep. 499, 38 L. ed. 385.

While perfect equality in taxation of any kind is unattainable, yet "When, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes [558] inadmissible": Cooley on Taxation, 2d ed., p. 169, 3d ed., pp. 259, 260.

In a case in Kentucky, where the statute required druggists to pay a license fee of fifty dollars for retailing liquors, in addition to the regular druggist's license, the supreme court, while holding that, as a police measure, the subject being spirituous liquors, the license could be sustained, yet as a revenue measure, it would be unlawful "to single out any particular commodity or encumber with a special tax any part of the druggists' trade properly embraced in the conduct of his business as a whole." "The legislature taxing the whole, cannot again tax the parts. . . . This would be such an arbitrary method of taxation as to be a violation of the Bill of Rights": Commonwealth v. Fowler, 96 Ky. 166, 170, 28 S. W. 786, 33 L. R. A. 839.

"A city cannot divide a single taxable privilege, and require a separate license for each of the elements": 2 Cooley on Taxation, 3d ed., p. 1103, and note 1; Ex parte Sims, 40 Fla. 432, 25 South. 280; Canova v. Williams, 41 Fla. 509, 27 South. 30.

The effort to fix a discriminative license tax on department stores is declared by the supreme court of Missouri to be a violation of the Bill of Rights: State v. Ashbrook, 154 Mo. 375, 77 Am. St. Rep. 765, 55 S. W. 627, 48 L. R. A. 265; see, also, City of Chicago v. Netcher, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, 48 L. R. A. 261.

The liberty which is so sedulously guarded by the constitutions of the United States and of this and other states comprehends more than the mere freedom from personal restraint. It includes the right to pursue any useful and harmless occupation, and to conduct the business in the citizen's own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation. If it be allowed that an additional burden may be placed upon a merchant who chooses to advertise his business by offering a small gratuity to customers in the shape of these trading stamps, it would be equally lawful to place an extra burden on one who advertises his business in the papers, or one who offers, out of his own stock, a certain gratuity to everyone purchasing goods [559] to a certain amount, or one who erects a handsome sign in front of his store, etc.

So long as his manner of conducting his business does not offend public morals and work an injury to the public, it is his constitutional right to pursue, on terms equal to that allowed to others in like business, even though his methods may have a tendency to draw trade to him, to the detriment of competitors: Young v. Commonwealth, 101 Va. 853, 45 S. E. 327; State v. Dalton, 22 R. I. 77, 84 Am. St. Rep. 818, 46 Atl. 234, 48 L. R. A. 775; People v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Long v. State, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4, 12 L. R. A. 425; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916.

The only two cases, so far as we have been able to ascertain, in which the courts take a different view of the general subject of trading stamps are Lansburgh v. District of Columbia, 11 App. Cas. 512, which was founded on a statute defining what a "gift enterprise" is (and the court suggested that even in that case the statute would not be operative in cases of a sale of some lawful article, accompanied by a gift where there was no chance, and the gift was not the real object of the purchase), and Fleetwood v. Read, 2 Wash 547, 58 Pac. 665, 47 L. R. A. 205, which is not supported by any authority.

In the case now under consideration the defendant with other merchants paid the regular license tax assessed in accordance with the amount of stock carried, and the ordinance in question required of any merchant who issued trading stamps an additional license of one hundred dollars with-

out regard to the amount of stock carried, and it also made him liable to a fine of one hundred dollars for each stamp issued without license.

It will be noticed that this license was not for engaging in any business, but for the manner in which he chose to conduct the business already licensed.

This is such a palpable attempt under the guise of a license tax to fix a penalty on the merchant for conducting his business in a certain way, that, under the authorities heretofore cited, we hold it to be unconstitutional and void. Our own court has decided that the trading stamp business is not a gift enterprise or lottery: State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 South. 28.

560 As to the powers granted by the city charter of Montgomery, we have not deemed it necessary to go into an exhaustive discussion, although it lies upon the surface that said charter itself provides "that but one license shall be collected or required of any person, firm or corporation, or for any particular trade, occupation, business or profession using but one place of business in carrying on such business, trade, occupation or profession": Acts 1894-95, p. 635, sec. 10.

The judgment of the court is affirmed.

McClellan, C. J., Tyson and Anderson, JJ., concurring.

The Constitutionality of Statutes intended to suppress the trading stamp business is denied in State v. Hawkins, 95 Md. 133, 93 Am. St. Rep. 328; State v. Dalton, 22 R. I. 77, 84 Am. St. Rep. 818. That trading stamp transactions do not constitute a lottery, see State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17.

WALKER v. WINN.

[142 Ala. 560, 39 South. 12.]

INSANE PERSONS—Contracts of.—A contract of an insane person, whether resting in parol or by deed, is absolutely void, and the person contracting with such insane person can take no benefit under the contract. (p. 50.)

INSANE PERSONS—Insanity as Defense to Contract.—The indorsement of a note by the insane payee is void and confers no right upon the indorsee, and in an action by the latter against the maker of the note, the insanity of the payee and indorser at the time of the indorsement is a valid defense. (pp. 51, 52.)

A. H. Merrill and W. C. Swanson, for the appellant.

E. P. Thomas and G. W. Peach, for the appellee.

563 DENSON, J. This is a suit upon a promissory note executed by defendant, David L. Walker, and two other persons (who are not sued) to Zachariah Bush. The note was transferred by the payee to John E. Crews, who brought this suit. Crews died and the cause was revived in the name of James J. Winn, Jr., as the administrator of his estate.

The defendant filed a sworn plea denying that the plaintiff was the party really interested in the note sued on, and also attempted by other special pleas to defend the suit upon the ground that the payee Bush, at the time he transferred the note to Crews, was insane.

Demurrers were interposed to the pleas which set up the defense of insanity. The principal grounds of demurrer 564 to the pleas, the ones which presented the real question at issue, are, that the contract of assignment of a note by an insane person is not void but voidable, and that insanity is a personal plea and not available to the defendant. The demurrers were sustained.

Whatever may be the rulings by the courts of other jurisdictions upon the question, this court is fully committed to the doctrine that the contract of an insane person is absolutely void: Dougherty v. Powe, 127 Ala. 577, 30 South. 524, and authorities there cited; Wilkinson v. Wilkinson, 129 Ala. 279, 30 South. 578; Galloway v. Hendon, 131 Ala. 280, 31 South. 603; Milligan v. Pollard, 112 Ala. 465, 20 South. 620.

We fail to appreciate the distinction attempted to be made by counsel for appellee in their argument between deeds and other contracts made by an insane person, with reference to

the application of the above-stated doctrine. That the principle upon which the deed of an insane person is declared void, in the case of Dougherty v. Powe, 127 Ala. 577, 30 South. 524, is applicable alike to all contracts of such person is obvious. It is stated by the court in that case that "one of the essential elements to the validity of a contract is the concurring assent of two minds. If one of the parties to a contract is insane at the time of its execution, this essential element is wanting. The principle is the same whether the contract rests in parol or be by a deed."

If, then, the contract of an insane person is void, it would seem to logically follow that a party contracting with him could not take any benefit under such contract—would get no title to property obtained from such a one.

We have no precedent by our court directly upon the point presented for consideration by the ruling of the court below, and there seems to be conflict in the decisions of courts of other states upon the question.

The case of Carrier v. Sears, 4 Allen (Mass.), 336, 81 Am. Dec. 707, is cited by appellee in support of the rulings of the court on the demurrers, and it must be conceded that the court's rulings are in full accord with the case. But in Massachusetts and in the other states, so far as our investigation has revealed, where courts have held that insanity is a personal plea, the ruling has been based upon [565] the principle that the contracts of an insane person are voidable and not void. The decision of the case cited above from the Massachusetts court is rested expressly upon that principle.

In the case of Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642, it was held that the indorsement of a promissory note by the payee is a contract which an insane person cannot make, because he has not the power to give that consent which the contract requires, and that in an action upon the note by an indorsee against the maker, insanity in the payee and indorser at the time of the indorsement and transfer is a valid defense.

This same view was taken of the question by the supreme court of Michigan in the case of Hannahs v. Sheldon, 20 Mich. 278. Cooley, J., delivered the opinion of the court.

There is another line of decisions which hold that the contracts of an insane person are only voidable before such a person is adjudicated insane by a court of competent jurisdiction, but that after such adjudication is had, all contracts made by such person are void: Bunn v. Postell, 107 Ga. 490,

33 S. E. 707; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Aetna Ins. Co. v. Sellers, 154 Ind. 370, 77 Am. St. Rep. 481, 56 N. E. 97.

Leaving out of view the decisions of the courts in other jurisdictions, this court having held that the contracts of an insane person are void, and it being true that the transfer of a note of necessity involves the making of a contract, we think it must follow as a logical sequence that the transfer of a note of an insane person must be held to be void. Further, as a payment of a note, such as will operate as an acquittance to the payor, must be made to the person who has authority to receive the payment, the payor may impeach the contract of transfer by showing the insanity of the transferrer at the time the contract was made.

It follows that the court erred in sustaining the demurrer to pleas numbered 4, 5, 6 and 7, but we are of the opinion, and so hold, that plea 8 was subject to the demurrer made to it and the court did not err in sustaining the demurrer to plea 8.

566 Under the sworn plea denying that the plaintiff was the party really interested in the note sued on, evidence that the payee of the note was insane at the time he transferred the note was competent and the court erred in excluding such evidence.

The questions presented by the eighth and ninth assignments of error will probably not arise on another trial and we deem it unnecessary to pass upon them here.

The judgment is reversed and the cause remanded.

McClellan, C. J., Haralson and Dowdell, JJ., concurring.

The Doctrine of the Principal Case, **that the contracts of an insane person are absolutely void, and not merely voidable, is opposed to the great weight of authority: See the monographic note to Flach v. Gottschalk Co., 71 Am. St. Rep. 425-433; Blinn v. Schwartz, 177 N. Y. 252, 101 Am. St. Rep. 806, and cases cited in the cross-reference note thereto.**

HAWKINS v. HAWKINS.

[142 Ala. 571, 38 South. 640.]

MARRIAGE—Void License.—A marriage solemnized without a valid license, and not followed by cohabitation, is not valid, either as a statutory or a common-law marriage. (p. 53.)

MARRIAGE — Duress — Invalid License — Annulment.—If a person is by duress coerced into entering into a marriage solemnized under an invalid license, and not followed by cohabitation, the person so coerced may maintain a bill in equity to have such pretended marriage declared null and void. (p. 54.)

Blackmore & Greene, for the appellant.

Tate & Walker, for the appellee.

573 McCLELLAN, C. J. Bill filed by Milton Hawkins against Bella Hawkins. Its averments present this case: Milton was under arrest and about to be tried preliminarily on the charge of having seduced Bella. He was innocent of the charge. He was young, a mere boy, and inexperienced. It was proposed to him to dismiss the prosecution and set him at liberty if he would marry the girl. He was advised by the magistrate before whom he had been brought and his trial was to be had that it would be best for him to do this. Thus environed, and pressed and advised, he consented to marry. Thereupon a ceremony of marriage was performed between him and the girl by said magistrate. This ceremony was had under the supposed authorization of a paper in form a marriage license, but which had no legal status as such, having been in part issued by the magistrate himself by filling in the names and date of a license form which had been signed in blank by the judge of probate. There has 574 never been any cohabitation of the parties as man and wife, nor sexual intercourse since—or even before—the ceremony. Leaving out of view the duress, this was no marriage. The formal apparent solemnization was without license, and hence inefficacious as a statutory marriage; and the formal consent to be man and wife was not consummated into that relation under the common law by cohabitation: Ashley v. State, 109 Ala. 48, 19 South. 917.

We are of opinion that the chancery court—of course wholly without reference to its statutory jurisdiction to grant divorces—has power to declare the nullity of the performance as a marriage. Had there been a valid license, the juris-

diction of chancery to annul the marriage under it is undoubted, being indeed the general jurisdiction of that court to annul contracts into which the complaining party has been coerced to enter. So, too, this jurisdiction would exist to that end had the complainant, moved thereto by the contract he had made under duress, consummated the agreement by cohabitation, assuming there was no stautory marriage. And though there was no license and has been no consummation, the contract of marriage—the undertaking to cohabit—is still extant, so to speak, and nominally subsisting and binding. The marriage might yet be consummated, and such consummation might well result from the moral, or supposed legal constraint of the contract which itself was the product of duress per minas. Under these circumstances, the complainant, we think, is entitled to invoke the jurisdiction of chancery to annul contracts induced by duress to a declaration of the nullity of this contract and of the consequent marriage, though only ceremonial. Without resting the jurisdiction at all upon that consideration, the fact that the license is regular and valid on its face, and the fact that a formal ceremony had been with apparent authority certified to the judge of probate, demonstrate the practical importance to the complainant of the relief he seeks. The jurisdiction attaching on the ground of duress, "the fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage [though no marriage in legal contemplation], is very apparent, and is equally conclusive to [575] good order and decorum, and to the peace and conscience of the party."

The bill has equity. It is not open to the objections taken by the demurrer. The decree of the city court overruling the motion to dismiss the bill for want of equity and the demurrer must be affirmed.

Tyson, Simpson and Anderson, JJ., concurring.

Marriages Consummated without a compliance with the statutory requirements as to procuring a license and having a solemnization are generally regarded valid as common-law marriages: See the monographic note to State v. Lowell, 79 Am. St. Rep. 361; Supreme Tent v. McAllister, 132 Mich. 69, 102 Am. St. Rep. 382. Compare, however, Norman v. Norman, 121 Cal. 620, 66 Am. St. Rep. 74.

It is not Essential to a Valid Marriage that there be cohabitation or coition: Franklin v. Franklin, 154 Mass. 515, 26 Am. St. Rep. 266; Hilton v. Roylance, 25 Utah, 129, 95 Am. St. Rep. 821.

BRANNON v. HENRY.

[142 Ala. 698, 39 South. 92.]

EJECTMENT—Color of Title—Evidence.—A deed void because of an indefinite and uncertain description does not amount to color of title. Hence possession under it is limited to possessio pedis. (p. 56.)

EJECTMENT—Color of Title.—A tax deed, though void as a muniment of title, is admissible in evidence to show color of title, unless it is void because of the uncertainty and indefiniteness of description. (p. 57.)

EJECTMENT—Color of Title.—If a deed is offered in evidence to show color of title in ejectment, it is not necessary that its execution should be proved. (p. 57.)

DEEDS—Description—Parol Evidence to Aid.—If a tax deed describes the land conveyed simply as being in a township, section, and range of a certain county, but fails to describe whether the township is north or south, or whether the range is east or west, but does recite the advertisement of the lands for sale to pay taxes due from the owner thereof, naming him, parol evidence is admissible to aid the description contained in the deed and to show what land was intended to be embraced, and such deed is then admissible to show color of title. (p. 58.)

EJECTMENT—Evidence.—In ejectment evidence that the defendant purchased the land from the state, paid therefor, and went into possession thereof, and has been in possession ever since, is relevant as tending to show the nature and character of his possession and his bona fide claim of purchase. (p. 59.)

EJECTMENT—Evidence.—Defendant in an action of ejectment, cannot be permitted, when testifying, to look at the deed under which he claims and state the township and range in which the land is actually located, when such description is not contained in the deed. (p. 59.)

EJECTMENT—Evidence.—In an action of ejectment, a question inquiring of defendant how much land he purchased in a certain section is objectionable, as assuming that he bought land in that section. (p. 59.)

McIntosh & Rich, for the appellant.

Ewin & McEleer, for the appellee.

699 DENSON, J. This is an action of statutory ejectment. While other lands were described in the complaint by 700 the proceedings had in the court below, and the judgment rendered there in favor of the plaintiff, the questions presented for consideration of this appeal relate only to that part of the land described in the complaint as the "N. E. 1-4 of section 36, township 2 south, of range 4 west, situated in Mobile county, Alabama."

The plaintiff offered in evidence a patent to the lands above described issued by the state of Alabama to Thomas

Henry on the second day of January, 1872, and then offered in evidence a certified copy of the last will and testament of Thomas Henry, deceased, devising the lands to plaintiff, together with the certificate of the judge of probate of Mobile county, showing the probate and record of said will. The foregoing was all of the plaintiff's evidence.

The defense attempted by the defendant was ten years adverse possession.

The defendant offered in evidence what purported to be a tax deed made to defendant by Cyrus D. Hogue, auditor, on the third day of April, 1890; the lands contained in said deed are described as follows, to wit: "N. E. 1-4 of section 36, township 2, range 4, lying and being situate in Mobile county, Alabama." The deed was offered merely for the purpose of showing color of title. The objection made by plaintiff to the deed was based on the ground that the deed was absolutely void and not self-proving. The court sustained the objection and the defendant duly excepted to the ruling of the court. It must be conceded that the tax deed offered in evidence is not effective as a muniment of title, nor was it depended upon by the defendant as such.

The insistence of the appellant is, that a deed may be void and yet be admissible in evidence to show color of title. This insistence is amply supported by authority, and many of the deeds which have been held by this court to operate as color of title were void tax deeds: Stovall v. Fowler, 72 Ala. 77; Childress v. Calloway, 76 Ala. 128; Hughes v. Anderson, 79 Ala. 209; Florence Land Co. v. Warren, 91 Ala. 533, 9 South. 384; Gist v. Beaumont, 104 Ala. 347, 16 South. 20; Zundel v. Baldwin, 114 Ala. 328, 21 South. 420; Reddick v. Long, 124 Ala. 260, 27 South. 402; Dorlan v. Westervitch, 140 Ala. 283, 103 Am. St. Rep. 35, 37 South. 382.

[701] The above rule, it seems, is subject to this qualification, that if the deed offered is void because of the uncertain and indefinite description of the land conveyed, such a deed would not convey color of title, and possession under it would be limited to "possessio pedis." This exception is supported by reason and authority: Black v. Tennessee Coal etc. R. R. Co., 93 Ala. 109, 9 South. 537; Louisville etc. R. R. Co. v. Boykin, 76 Ala. 560.

It has been observed that the only objections made to the deed were, that it was absolutely void and that it was not self-proving. Where a paper writing is offered to show color of

title it is not necessary that its execution should be proved: Gist v. Beaumont, 104 Ala. 347, 16 South. 20; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 South. 43.

It may be true that if at the time the deed was offered there had been an objection that there was not at the time the deed was offered any proof of actual possession under the deed, the court should have sustained it, but no such objection appears to have been made.

Is the deed void because of uncertainty and indefiniteness in the description of the lands, so as to bring it within the qualification above stated to the rule bearing upon the admissibility of a void tax deed as color of title? The appellee contends that it is, and that there can, for this reason, be no proper application of the rule, id certum est quod reddi potest. "This contention raises the question of patent ambiguity, which the authorities say can neither be explained nor made certain by parol proof." In the case of Chambers v. Ringstaff, 69 Ala. 140, Judge Stone, discussing the question, said: "The distinction between latent and patent ambiguity has long existed, and the general rule applicable to each class of cases should not be disturbed. When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, things etc., that is patent ambiguity, or ambiguity apparent. In such cases, the rule is clear, and we do not wish to depart from it, that parol proof of what was intended by the contracting parties will not be received. Latent ambiguity exists when, on the face of the paper, no doubt or uncertainty exists, but by proof aliunde, the language is shown to be alike applicable to two or more 702 persons, things, etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that by which it is made to appear." The conveyance which the learned judge had under construction in that case described the land only by section, township and range. It called for parts of sections 7 and 17, in township 12, range 18, nothing being said of the state, county, land district or government survey in which the lands were situated. With reference to the description, in further discussion of the ambiguity, Judge Stone said: "Now, we judicially know but there is but one tract of land in Alabama which corresponds with this description. There is but one range 18 in the state, and that lies east of the basis meridian of St. Stephens. There is but one township 12 that bisects

range 18, and that is north of the base of the survey." Under the above facts and statement of law, it was held permissible to adduce proof that the grantors at the time the conveyance was executed, owned and resided on lands in Montgomery county, Alabama, known by the same numbers as those employed in the conveyance.

We judicially know that there is no range 4 east in Mobile county, and we judicially know that there is a township 2 north, and a township 2 south, in that county, and that there is a section 36 in each of said townships. The deed we have for construction, in the description of the lands by the government survey designates with equal clearness the two tracts of land, and if this were all, the ambiguity might be patent and parol evidence would not be admissible to aid the description. But we find in the deed offered in evidence this recital, to wit: "That, whereas, on the 17th day of May, A. D. 1881, and for three successive weeks thereafter, advertisement was made for the sale of the lands hereinafter described and conveyed, for the payment of the state and county taxes then due from M. D. Mann, the owner of said lands." We do not judicially know which tract M. D. Mann owned, and we are clear in our conclusion that this reference to the lands in the deed would authorize a resort to competent parol evidence to aid the description [703] set forth in the deed, and that the deed is not within the qualification referred to: Black v. Pratt Coal etc. Co., 85 Ala. 504, 5 South. 89; De Jarnett v. McDaniel, 93 Ala. 215, 9 South. 570; Black v. Tennessee Coal etc. R. R. Co., 93 Ala. 109, 9 South. 537; Webb v. Elyton Land Co., 105 Ala. 471, 18 South. 178; Dorlan v. Westervitch, 140 Ala. 283, 103 Am. St. Rep. 35, 37 South. 382.

It follows that the court erred in sustaining the objections made to the deed, offered as it was to show color of title merely.

After the defendant, as a witness in his own behalf, had without objection testified that he purchased the land described in the complaint from the state and paid eighty dollars therefor, and that he immediately went into possession of it, and had been in possession of it ever since, the plaintiff moved to exclude this testimony because the deed under which he claims to have purchased is void and shows on its face that it does not describe any land whatever. The court granted the motion and the defendant excepted. In this ruling we think the court erred. It will be noted that the only deed

which had been offered by defendant was, on objection of the plaintiff, not allowed in evidence, therefore, at the time the motion was made, there was no evidence that defendant was claiming under a deed, void or otherwise. Hence the specific ground of the motion was without foundation, and for this reason should have been overruled. But we think the evidence was not objectionable. It was certainly competent for the defendant to show that he went into possession of the land, and the evidence that he bought it and paid for it was relevant as tending to show the nature and character of the possession, and his claim, whether under bona fide claim of purchase: Barron v. Barron, 122 Ala. 194, 25 South. 55.

It was not competent for the defendant when testifying to look at the deed and say whether the land described in the deed was in township 2 south, or township 2 north, and whether it was in range 4 east or west. The description in the deed might have been aided by proof tending to show that M. D. Mann once owned the lands or that he was in possession of them, and that he was in possession of the lands in township 2 south if such proof was obtainable, and that the tax proceedings were had [704] against him with reference to this land. This would be showing the circumstances and situation of the parties and land, and would give to the jury and court something shedding light upon the parties at the time the deed was made, so that their intention might be arrived at. The court did not err in sustaining plaintiff's objection to this question asked defendant by his counsel, to wit: "I will ask you how much land did you buy in section 36?" If not objectionable otherwise, it assumes that defendant bought lands in section 36. The defendant claiming as an adverse holder, it is important that he should show that he entered upon the land under a bona fide claim of purchase to exempt him from filing the notice required by the Code of 1896, section 1541. The statute has no application to a party who enters under a bona fide claim of purchase: Holt v. Adams, 121 Ala. 664, 25 South. 716; Sledge v. Singley, 139 Ala. 346, 37 South. 98.

The defendant should, under the rule above declared, have been permitted to show that he purchased the land and paid for it and that he was claiming under the purchase. This does not mean that the deed would have been admissible in evidence without proof aliunde aiding the description.

The seventh ground in the assignment of error presents for consideration the propriety of the court's action in giving the

affirmative charge for the plaintiff, but as the judgment must be reversed for errors pointed out above, we deem it unnecessary to consider this assignment.

Reversed and remanded.

McClellan, C. J., Haralson and Dowdell, JJ., concurring.

A Void Deed May Constitute Color of Title within the meaning of the law of adverse possession: See the monographic note to Power v. Kitching, 88 Am. St. Rep. 705; Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959. This rule applies to void tax deeds. Though worthless muniments of title, they may be admissible in evidence to show the boundaries and mark the extent of the possession: See the monographic note to Power v. Kitching, 88 Am. St. Rep. 726-729.

CASES

IN THE

SUPREME COURT

OF

FLORIDA.

MEACHAM v. STATE.

[45 Fla. 71, 33 South. 983.]

EVIDENCE—Conversation Through Interpreter.—If two persons, who cannot understand each other, converse through an interpreter, the words of the latter, which are their necessary medium of communication, are adopted by both, and made part of their conversation, as much as those which fall from their own lips, and the interpretation, under such circumstances, is prima facie to be deemed correct. In such case either person or a third person, who hears the conversation, may testify to it as he understands it, although for his understanding of what was said by one of the parties he is dependent on the interpretation which was a part of the conversation. The fact that such conversation was had through an interpreter affects the weight, but not the competency, of the evidence. (pp. 62, 63.)

EMBEZZLEMENT—Indictment—Proof of Ownership.—In a prosecution for embezzlement the ownership of the property embezzled must be laid in the indictment and proved with the same particularity as in larceny, but the proof is sufficient if it shows a qualified or special property in the person alleged to be the owner. (p. 63.)

EVIDENCE—Part of Conversation.—A witness may testify to what he heard said in a conversation between other persons, even if it is not shown that he heard the whole of such conversation. (p. 64.)

H. S. Hampton, for the plaintiff in error.

W. B. Lamar, attorney general, for the state.

[72] CARTER, P. J. In September, 1902, plaintiff in error was tried and convicted in the criminal court of record of Hillsborough county upon an information, charging embezzlement. The second count of the information upon which the verdict and judgment are based charged embezzlement of the proceeds of sixty-three boxes of cigars intrusted to defendant by one Louis Galvin. Upon the trial Galvin testified that he gave defendant the cigars to sell for him upon a commission

of five per cent, and that upon demand for the proceeds defendant admitted that he had sold the cigars and used all the money derived therefrom. The defendant admitted receiving the cigars, but claimed that he purchased them from Galvin with the understanding that he was to pay for them at a designated time. The testimony of the witness Galvin was delivered through an interpreter, it appearing that he spoke English very imperfectly. On cross-examination he was asked if he did not on the morning of the preliminary examination of the defendant state in the presence of H. D. Webster and Robert Lore that he had sold the cigars to defendant to be paid for at a specified time. The witness answered the question in the negative. He admitted having a conversation at the time and place designated, but denied having made the statements inquired [73] about. Webster was examined by defendant and testified that on the occasion inquired about he acted as interpreter at the request of Galvin in a conversation carried on between Galvin and defendant—the former speaking Spanish, the latter English. The testimony of this witness tended to show that in this conversation Galvin admitted that he sold cigars to the defendant, to be paid for at a designated time. Thereupon defendant produced as a witness Robert Lore, who testified that he was present at the conversation between Galvin and defendant had through Webster, the interpreter; that he did not understand Spanish and could not therefore state what Galvin said. The defendant thereupon offered to prove by the witness the conversation then had, including the remarks of Galvin as interpreted by Webster at the time. The testimony was excluded upon objections that it was hearsay and irrelevant, and that the witness could not understand Spanish. The exception to this ruling constitutes the first assignment of error. This ruling was erroneous. From what has been stated, the relevancy of the proposed testimony is clearly apparent, and it only remains to consider whether it could properly be excluded because hearsay or because the witness did not understand the language in which Galvin carried on his part of the conversation.

In Commonwealth v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813, it was held that where two parties speaking different language and who cannot understand each other converse through an interpreter, the words of the interpreter which are their necessary medium of communication are adopted by both and made a part of their conversation, as

much as those which fall from their own lips; that the interpretation under such [74] circumstances is prima facie to be deemed correct; that in such a case either party or a third party who hears the conversation may testify to it as he understands it, although for his understanding of what was said by one of the parties he is dependent on the interpretation which was a part of the conversation; that the fact that such conversation was had through an interpreter affects the weight, but not the competency, of the evidence. This view is supported by other courts and by standard text-writers: Fabrigas v. Mostyn, 20 How. St. Tr. 81, 122, 123; Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947; Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Greenleaf on Evidence, sec. 183; Wharton's Criminal Evidence, sec. 224. The testimony was proper and the court erred in excluding it.

The second assignment of error is based upon exceptions to an instruction given by the court to the effect that the state was not required to prove absolute ownership in Louis Galvin of the cigars delivered to defendant, but that it would be sufficient to prove simple possession on his part. We are not prepared to say that proof of "simple possession" of the property alleged to have been embezzled will in all cases be sufficient to sustain the allegation of ownership. Nor do we think it at all necessary that the alleged owner shall be proved to be the absolute owner of such property in order to warrant a conviction. If he has a qualified or special property in the goods embezzled, it will be sufficient. The ownership must be laid in the indictment as in an indictment for larceny (Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 South. 225), and we perceive no reason why the proof of ownership in embezzlement should not be sufficient if it would support an allegation of ownership in larceny. The rule in the [75] latter offense is that the ownership may be laid in the person having a qualified or special property in the property stolen (Kennedy v. State, 31 Fla. 428, 12 South. 858), and we hold that the same rule obtains in prosecution for embezzlement: Waterman v. State, 116 Ind. 51, 18 N. E. 63; Riley v. State, 32 Tex. 763. See, also, State v. Littschke, 27 Or. 189, 40 Pac. 167. As applied to the evidence in this case, the instruction could not have misled the jury, but the use of the term "simple possession" might in some cases be very misleading and we therefore do not approve the precise language of the instruction.

The ninth assignment of error is based upon the ruling permitting the following question to be propounded to the state witness, Rosa Herrick: "What was he to get for selling the cigars?" The witness had testified that she was present when Galvin delivered cigars to defendant to sell for him and that defendant came back next day and told Galvin he would go and get his money and bring it Saturday. The question objected to was then propounded. Several objections were interposed, but the only one insisted upon in this court is that the question was improper because it had not first been shown by the testimony of the witness that she heard the entire conversation. The question was proper as against the objection urged: Williams v. Keyser, 11 Fla. 234, 89 Am. Dec. 243.

Several other questions are presented by the assignments of error. They need not necessarily arise upon another trial, and we shall not therefore discuss them.

It may be well for the parties to consider the sufficiency of the information, tested by the decision in Grant v. State, 35 Fla. 581, 48 Am. St. Rep. 263, 17 South. 225, before proceeding to trial a second time. It was there held that where an indictment alleges embezzlement [76] of the proceeds of property, it must allege the value and ownership of such proceeds. It is, to say the least, doubtful if the present information is sufficient in that as well as other respects, but as the question of its sufficiency is not argued in this court, and the judgment is reversed upon other grounds, we refrain from deciding it.

The judgment is reversed and a new trial granted.

If Two Persons who do not speak a common language agree upon a third person to interpret between them, the latter is considered the agent of each to translate and communicate what he says to the other, and the communication by the interpreter is not hearsay, and the person to whom it is made may testify to it: Miller v. Lathrop, 50 Minn. 91, 52 N. W. 274. For other cases bearing on this question, see State v. Noyes, 36 Conn. 80, 4 Am. Rep. 37; Commonwealth v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813; Territory v. Big Knob on Head, 6 Mont. 242, 11 Pac. 670; Wise v. Newatney, 26 Neb. 88, 42 N. W. 339; Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947.

McNISH v. STATE.

[45 Fla. 83, 34 South. 219.]

CRIMINAL LAW—Confessions as Evidence.—If a confession has once been obtained through illegal influence, it must be clearly shown that such influence has been removed before a subsequent confession can be received in evidence. (pp. 65, 66.)

CRIMINAL LAW—Evidence—Confession by Plea of Guilty.—A plea of guilty before a committing magistrate is not admissible in evidence as a voluntary confession, if the defendant was not warned that such plea might be used against him. This is especially true when the examination was held amidst excitement and under threats against the life of the defendant. (p. 66.)

TRIAL.—Instructions to the effect that if the jury believe that the defendant did not commit the crime it should acquit, are erroneous and misleading, if given as an isolated proposition. (p. 66.)

A. J. Henry, for the plaintiffs in error.

W. B. Lamar, attorney general, for the state.

84 COCKRELL, J. The plaintiffs in error were jointly indicted, tried and convicted of breaking and entering a dwelling-house with intent to commit a felony.

The state was permitted over the objections of the plaintiffs in error, hereafter called the defendants, to introduce in evidence the proceedings on the defendants' preliminary examination before a justice of the peace, acting as committing magistrate, wherein they had pleaded guilty, one for burglary and two as accessaries thereto. It had been shown that the constable who was still in charge of these defendants had recently before promised one of them that it would be easier for him if he confessed, and an alleged confession so induced had been ruled out by the court. It had further been shown that the justice had called upon them to say whether they were guilty or not guilty, and they were not cautioned or informed that the matter of the plea might be used against them in another trial. Under the circumstances above recited the admission of these pleas was prejudicial error. The justice had no jurisdiction to try the offense charged, but merely "to ascertain whether there is good ground to hold the accused to bail": Rev. Stats., sec. 2874.

This court has held strictly to the rule that confessions of the accused should be acted upon with great caution, and it must be clearly shown that when a confession has once been

obtained through illegal influence, such has been removed before a subsequent confession may be received. [85] We have also emphasized the duty of a committing magistrate to caution the accused that any statement he may make may be used against him and to inform him of his rights in the premises: Coffee v. State, 25 Fla. 501, 23 Am. St. Rep. 525, 6 South. 493; Green v. State, 40 Fla. 474, 24 South. 537; Anthony v. State, 44 Fla. 1, 32 South. 818. See, also, Bram v. United States, 168 U. S. 532, 18 Sup. Ct. Rep. 183, 42 L. ed. 568; Rex v. Green, 5 Car. & P. 312; Regina v. Arnold, 8 Car. & P. 621. The conditions surrounding this preliminary hearing emphasized the propriety of this rule. It was held midst considerable excitement and there is uncontradicted testimony that threats against the lives of the accused were being made, unrebuked by the officer in whose custody and under whose protection they were.

It is also assigned as error that the court gave this charge: "If you believe from the evidence that the defendants at the bar, or either of them, did not break or enter this building, it will be your duty to acquit them or either of them that you believe did not commit the offense." While it is unquestionably the law that where the evidence proves a defendant innocent of the crime it is the duty of the jury to acquit, the charge is subject to the criticism that it may lead the jury to believe that the defendant must prove his innocence, and not that the state must prove his guilt beyond a reasonable doubt. As an isolated proposition the charge is misleading and should not be given.

We think it unnecessary to notice the other assignments, as the questions presented thereby need not arise on another trial.

Judgment reversed and a new trial awarded.

The Admissibility in Evidence of Confessions is discussed in the monographic note to Daniels v. State, 6 Am. St. Rep. 242-251. To be admissible, a confession must be free and voluntary: State v. Nagle, 25 R. I. 105, 105 Am. St. Rep. 864; State v. Woodward, 182 Mo. 391, 103 Am. St. Rep. 646. As to the admissibility of a confession made by an accused at his preliminary examination, see Baker v. State, 25 Tex. App. 1, 8 Am. St. Rep. 427; People v. Gould, 70 Mich. 240, 14 Am. St. Rep. 493; Coffee v. State, 25 Fla. 501, 23 Am. St. Rep. 525; Tabor v. State, 34 Tex. Cr. Rep. 631, 53 Am. St. Rep. 726; Dill v. State, 35 Tex. Cr. Rep. 240, 60 Am. St. Rep. 37. Where it appears to the satisfaction of the judge that the improper influence used to obtain a confession was totally done away with before a second confession was made, the latter is admissible in evidence: Bullock v. State, 65 N. J. L. 557, 86 Am. St. Rep. 668.

PENSACOLA AND ATLANTIC RAILROAD COMPANY v. STATE.

[45 Fla. 86, 33 South. 985.]

PENALTIES—Repeal of Penal Statute.—In civil actions of a penal character depending upon a statute where the penalty inures to the state, the repeal of the statute pending an appeal deprives the appellate court of any power to render any judgment by which the penalty may be enforced, and the effect of the repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law. This rule applies to a civil suit for the recovery of a penalty not prescribed as a punishment for a crime, although it does not apply in Florida to the punishment of a criminal for the commission of a crime, because of a constitutional saving clause. (pp. 68, 69.)

ACTIONS—Appeal—Conclusion.—An action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it. (p. 68.)

W. A. Blount and J. A. Carter, for the appellant.

W. B. Lamar, attorney general, for the state.

[87] TAYLOR, C. J. Section 17 of chapter 3746 of the laws approved June 7, 1887, entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this state, ... and to appoint commissioners and to prescribe their powers and duties, in relation to the same," provides as follows: "That if any railroad company doing business in this state, by its agents or employés, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal office thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one hundred dollars, nor more than five thousand dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall lie in any county in the state where such violation has occurred, or wrong has [88] been perpetrated, and shall be in the name of the state of Florida. The commissioners shall institute such action through the attorney general or state attorney."

Section 18 of the same act gives a right of action and recovery to individuals for any wrong or injury resulting to

them through the violation by any railroad company of any rule or regulation provided by the commissioners, the rule of damages in any such case by an individual to be the same as in a similar action between individuals.

Under the provisions of said section 17 of said act above quoted, the state of Florida, through its attorney general, instituted suit in the circuit court of Jackson county against the appellant alleging a violation by it of a rule and regulation prescribed by the railroad commissioners in charging and collecting from a passenger the sum of eighty-five cents more for transportation fare on its road than the rate prescribed by such commissioners. This suit resulted in a judgment on June 6, 1891, against the appellant for the sum of $1,000 and costs, that being the amount of the penalty fixed by the judge for the violation aforesaid. From this judgment, on the day of its rendition—June 6, 1891—the defendant in open court took its appeal to this court.

In the assignments of error it is suggested to the court that subsequently to the rendition of such judgment, to wit, on June 13, 1891, the legislature of Florida enacted chapter 4068 that, in express terms, absolutely repealed said chapter 3746 and all acts amendatory thereof, upon which the said judgment was predicated, without reservation or saving clause, and that the unenforced penalty, suspended by the appeal, fell with the act authorizing it, and that the unconditional repeal of the law affixing [89] the penalty is itself a remission of such penalty, and that all that this court can now do is to reverse the judgment and order a dismissal of the suit. This suit, though in form a civil one at law, was for the recovery of a sum that was clearly penal in its character. Indeed, the section of the statute under which it was brought characterizes it as a "penalty" to be recovered at the suit of the state. The law seems to be quite clearly settled that in actions of a penal character, depending upon a statute, the repeal of the statute pending an appeal will deprive the appellate court of any power to render a judgment by which this penalty may be enforced, and that the effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted and concluded whilst it was an existing law, and that an action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it: State v. Can-

field, 40 Fla. 36, 23 South. 591, 42 L. R. A. 72; First Nat. Bank of San Luis Obispo v. Henderson, 101 Cal. 307, 35 Pac. 899; Denver etc. Ry. Co. v. Crawford, 11 Colo. 598, 19 Pac. 673; Speckert v. Louisville, 78 Ky. 287; State of Maryland v. Baltimore etc. R. R. Co., 3 How. (U. S.) 534, 11 L. ed. 714; Norris v. Crocker, 13 How. (U. S.) 429, 14 L. ed. 210; Yeaton v. United States, 5 Cranch, 281; Schooner Rachel v. United States, 6 Cranch, 329; Butler v. Palmer, 1 Hill (N. Y.), 324; Union Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367; Governor v. Howard, 1 Murph. (N. C.) 465; Mix v. Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Musgrove v. Vicksburg etc. R. R. Co., 50 Miss. 677; Cooley's Constitutional Limitations, [90] sixth edition, p. 469; County of Menard v. Kincaid, 71 Ill. 587; Kay v. Goodwin, 6 Bing. 576, 4 Moore & P. 341, 8 L. J. C. P. 212; Fitze v. State, 13 Tex. App. 372; Pinckard v. State, 13 Tex. App. 373. The principle announced in the two last cases cited, while applicable to the case under consideration, that is a civil suit for the recovery of a penalty not prescribed as a punishment for crime, would not be applicable in this state to the prosecution or punishment of a criminal for the commission of a crime, because of the presence in our constitution of the following section 32 of article 3: "The repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment." But were it not for this constitutional saving clause in criminal cases here, the rule announced in the two cited Texas cases would be applicable here to criminal cases, as was held in the case of Higginbotham v. State, 19 Fla. 557. But to a civil suit for the recovery of a penalty imposed by the statute for an act that is not denounced or punishable as a crime, the quoted saving clause from our constitution has no applicability, and the repeal of the statute imposing such penalty operates as a release or remission of such penalty where there is no saving clause as to past violations of such repealed statute; and after the repealing takes effect, no further proceedings can be taken under the law so repealed to enforce the penalty; and, as was held in the case of Higginbotham v. State, 19 Fla. 557, this rule applies to proceedings upon appeal in the appellate court, as well as to the court having original jurisdiction of the case, and as well when the repeal of the law took effect after the removal of the cause to the appellate court as before. The judgment here being in favor of the [91] state, there can, of

course, arise no question of an improper devesting of vested right, as there can be no question as to the power of the state to release claims in its own favor.

It follows from what has been said that the judgment of the circuit court in said cause must be reversed and the cause dismissed at the cost of the appellee, and it is so ordered and adjudged.

The Effect of the Repeal of a penal statute is to prevent any prosecution, trial, or judgment for any offense committed against it while it was in force unless there is a saving clause in the repealing act. If it is repealed pending an appeal and before the final action of the appellate court, the repeal will prevent the affirmance of a conviction. The prosecution must be dismissed and the judgment reversed: Ball v. Tolman, 135 Cal. 375, 87 Am. St. Rep. 110; Mahoney v. State, 5 Wyo. 520, 63 Am. St. Rep. 64.

DOKE v. PEEK.

[45 Fla. 244, 34 South. 896.]

INJUNCTION Against Cutting Timber.—The fact that timber standing upon land constitutes its chief value does not give equity jurisdiction to enjoin the cutting of such timber, upon the application of one who owns it, but not the land. (p. 71.)

INJUNCTION Against Cutting Timber.—A bill for an injunction alleging that the complainant is the owner of timber upon certain land and in the actual possession thereof, and that such land is chiefly valuable for such timber, and is wild, unimproved, and unoccupied, is insufficient to support an injunction against a trespasser thereon, even though the chief value of the land would be destroyed by the removal of such timber. (p. 72.)

INJUNCTION—Evidence of Insolvency of Defendant.—Upon a hearing for an injunction, proof of the insolvency of the defendant must be direct and positive and not merely upon information and belief. (p. 72.)

E. Haile, for the appellants.

W. W. Hampton, for the appellee.

245 COCKRELL, J. Appellee, in a bill exhibited against the appellants, alleged that he was the owner of the timber on certain described lands, and was in the actual possession of said property; that defendants, without authority of law and without any valid right, title or interest in the said land, or to the said timber thereon, had gone upon said lands with a large force of hands and had cut and were cutting the timber

for the purpose of making cross-ties; that the said land was valuable chiefly for the timber thereon, and was wild, unimproved and unoccupied, and if the said timber were cut and removed as aforesaid, the chief value of said land would be destroyed. It is alleged on information and belief that the defendants were both insolvent; it is prayed that the defendants be enjoined from [246] cutting and removing timber off or from said land and from removing any timber therefrom that may have been cut by defendants, and further, that an accounting be had of the timber already cut. From a decree granting a temporary injunction as prayed this appeal is taken.

On what is the supposed equity for an injunction based? The frame of the bill would suggest an attempt to follow section 1469 of the Revised Statutes, which reads: "Courts of chancery shall entertain suits by any person claiming to own any timbered lands in this state, to enjoin trespasses on such lands by the cutting of trees thereon, or the removal of logs therefrom, ... and in such suits the courts shall cause an account to be taken of the damage to the complainant from any of said trespasses." The allegations of the bill, however, fail to come up to the requirements of this section. Complainant does not claim to own any timbered lands in this state, but to be "the owner of the timber upon the land," as though there were a complete separation of the title to the timber and of the title to the land whereon the timber stands, and the whole scope of the bill shows a well-defined understanding of the terms so as to indicate that the distinction was intentional and not a slip of the pen. It is clear from an inspection of the statute that it was the owner of the land the law was seeking to protect and not the purchaser of timber rights.

We do not consider these views as conflicting with those expressed in Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19, wherein it was held that a parol sale of standing trees was void as being a sale of an interest in land. While we do not hold that a sale of the timber is not a sale of an interest in the land, we do hold that such a purchaser is not the "owner of timbered lands" within the meaning of the statute.

[247] Is there equity for an injunction irrespective of the statute? In Wiggins v. William, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754, this court considered this statute as extending the powers of the chancery court beyond the limits of its juris-

diction theretofore exercised, "in this, that claimants of timbered lands are given the right to have an injunction against the trespasses mentioned without reference to the character of the injury as being irreparable or the inadequacy of the legal remedy for the wrong, or actual possession of the claimant." There is an entire absence of a showing of irreparable injury to the complainant in this bill. It is alleged that if the timber be cut, the chief value of the land will be destroyed, but this injury to the land as land would fall not upon the complainant, it would fall upon some third person who is the owner of the land and who is not a party to the proceedings. There is no allegation that the trees are of peculiar value by virtue of their nature, the purpose for which they are acquired, the uses to which they were to be put, or of the conditions surrounding their owner, the complainant, so as to show the damages would be irreparable.

Even if insolvency of the defendants could be an independent equity sufficient to support an injunction, the proof of such insolvency at the hearing must be direct and positive and not upon information and belief. The affidavit used at this hearing, read in the light of the allegations of the bill, does not come up to the rule laid down in Ballard v. Eckman & Vetsburg, 20 Fla. 661, which requires the oath of the person from whom the information is obtained.

For the reasons stated the temporary injunction should not have been granted. The order granting it is reversed and the cause remanded for further proceedings.

Injunctions against the cutting of timber are discussed in the extended note to Moore v. Halliday, 99 Am. St. Rep. 748-750.

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY v. MOONEY.

[45 Fla. 286, 33 South. 1010.]

NEGLIGENCE.—Evidence as to other accidents causing injury to persons and property not relevant to the case on trial, as well as opinions with reference to matters as to which opinion evidence is inadmissible, is properly excluded. (p. 74.)

EVIDENCE.—Letters written by a witness to the opposite party to the litigation, concerning the subject matter thereof, and tending to discredit such witness' testimony, are admissible in evidence. (pp. 74, 75.)

NEGLIGENCE, Contributory.—If in the performance of his duties an employé has no instructions to pursue a particular method, and two or more methods are open to him, he cannot be said to be negligent, if he in good faith adopts that method which is more hazardous than another, if the one adopted was one which reasonable and prudent persons would have adopted under like conditions and circumstances. (pp. 75, 76.)

NEGLIGENCE—Contributory.—Shifting cars by means of the "kicking back" process is not necessarily at all times an act of negligence per se, even though there may be a safer method of shifting them. (p. 76.)

NEGLIGENCE—Contributory—Fellow-servants.—A servant injured by the negligence of a fellow-servant must have been in the exercise of ordinary care for his own safety or that degree of care which prudent persons usually exercise under similar circumstances in order to recover damages, and if he is injured by a failure to exercise such care, the master is not liable. (p. 76.)

NEGLIGENCE—Damages.—If, in an action to recover damages for personal injury caused by negligence, there is an entire absence of any evidence tending to authorize the infliction of punitive damages, the court should instruct the jury that no such damages should be allowed, and it is error to refuse to so instruct. (p. 77.)

W. W. Hampton and E. A. Pinnell, for the plaintiff in error.

H. Davis and J. A. Williams, for the defendant in error.

288 CARTER, P. J. This was an action instituted by defendant in error against plaintiff in error in the circuit court of Levy county to recover damages for personal injuries. Upon writ of error from a judgment for plaintiff such judgment was reversed by this court (Florida Cent. etc. R. Co. v. Mooney, 40 Fla. 17, 24 South. 148), and at a subsequent trial plaintiff recovered judgment for seven thousand dollars, from which the present writ of error was taken. The pleadings and most important facts of the case will be found stated in the former opinion.

The first assignment of error is based upon the ruling sustaining objection to the following question propounded by defendant upon cross-examination of plaintiff as a witness, viz.: "Was it not in violation of the rules of the company to jump on or off cars or to uncouple them while in motion?" The objection interposed was that the printed rules were the best evidence. The objection was untenable, as at the time it was interposed there was no proof that defendant ever had any printed rules. Whether, as contended by defendant in error, the ruling would be material in view of the fact that subsequently the defendant produced its printed rules and interrogated the witness respecting them, it is unnecessary to decide, as the judgment is reversed upon another ground, and this precise question may not, and probably will not, arise upon another trial.

The second assignment of error complains that the [289] court erred in sustaining objections to the following question propounded by defendant to its witness, L. H. Temple, viz.: "In your eighteen years' experience do you know of any accident causing injury to persons or damage to property?" The testimony sought to be elicited by this question was so clearly irrelevant that it is not deemed necessary to discuss the ruling further than to say it was right.

The third assignment of error is based upon the ruling sustaining objections to the following question propounded to the same witness, viz.: "If the company knew that you had made running switches at night what would have been the result?" The defendant contended that the plaintiff was injured in making a running switch at night and sought to prove by this witness that a rule of the company prohibited employés from making running switches. The witness stated that running switches were very dangerous to persons and property; that he at other places on defendant's lines of road had made them —that he made them at night, but did not let the officers of the company know it. Thereupon the question quoted was propounded. The court was right in excluding it. The witness' answer would have been merely his opinion, regarding a matter as to which opinion evidence is inadmissible.

The fourth assignment complains of the ruling admitting in evidence two letters written by defendant's witness, Ned F. Launt, to plaintiff about a year after the injury. Launt was defendant's locomotive engineer at the time of the injury, and according to plaintiff's testimony his failure to obey a

signal to stop the engine and cars caused the injury. This witness had testified that the understanding [290] between him and plaintiff was that the train was not to stop before it reached the switch at which plaintiff was injured, but that it was simply to slow down, and that he saw no signal given to stop. Plaintiff testified that the train was to stop before the switch was reached upon a signal from him, and that he gave the signal in due time. The letters were as follows:

"Mt. Carmel, Ill., 5-4, 1894.

"Dear Friend Jack: The F. C. & P. lawyer, whose up here, and tried his best to get me to tell him something about the accident, and I would not tell him a word; and if he comes to C. Keys, and tries to bluff you, you tell him to go to hell. He may have some papers, but dont you compromise with a thing, for I did not sign my name to anything. For I did not do anything that would hurt you in the least, for I would not be that kind of a man. Jack, you just keep still and wait, for you have some enemy in that town that you dont suspect. If I do not go to work, I will be there by and by. Don't not show this to anyone, and when I come, I will tell you something that you don't know. Ans. this at once.

"Yours,

"N. F. LAUNT,

"Mt. Carmel, Ill.

"Cedar Keys, 5-18, 1894.

"Jack Mooney, Albion, Florida.

"Dear Friend Jack: Meet me at the depot Sunday, on the arrival of No. 16, I want to speak to you—I am going to Waldo Sunday. And please give me that letter, I wrote you from Mt. Carmel. Don't fail to be there.

"Resp.

"NED LAUNT."

[291] These letters were offered in rebuttal and were competent as tending to discredit the testimony of the witness Launt.

The fifth assignment of error is not argued, and is, therefore, treated as abandoned.

The sixth and seventh assignments of error are based upon the following instructions given at plaintiff's request: "Third charge: If in the performance of his duties, J. W. Mooney had no instructions to pursue a particular method, and two or more methods were open to him, he cannot be said to have been negligent, if he, in good faith, adopted that method

which was more hazardous than another, if the one adopted be one which reasonable and prudent persons would adopt under like circumstances.

"Fourth charge: Shifting cars by means of the kicking back process is not necessarily at all times an act of negligence, per se, even though there may be a safer method of shifting them." These instructions assert correct propositions (Florida Cent. etc. Co. v. Mooney, 40 Fla. 17, 24 South. 148) and were applicable to the case made by the pleadings and evidence. There was, therefore, no error in giving them.

The eighth assignment of error complains of the refusal to give the second instruction requested by defendant as follows: "Second charge: To entitle the plaintiff to recover damages in this action he must himself have been free from fault. It is not enough for him to show that the company was guilty of the negligence, but it must appear from the evidence that the plaintiff himself employed all reasonable means to foresee and prevent the injury, and that he was entirely free from fault or negligence. Any fault or negligence on his part will prevent [202] recovery." This instruction was properly refused because in so far as it asserted correct propositions it was fully covered by the first instruction given on behalf of defendant, as follows: "If you believe from the evidence that the plaintiff was injured while engaged in the performance of his usual duties as a servant of the defendant, I charge you that he was bound to exercise ordinary care for his own safety or that degree of care which prudent persons usually exercise under similar circumstances; and if he was injured by failure to exercise such care, then the defendant is not liable in this action." The instruction given correctly states the circumstances under which plaintiff would in law be deemed entirely free from fault, and the jury were advised by it that a failure to exercise the care therein required would bar his recovery.

The tenth assignment of error is based upon exception to certain portions of the argument of counsel for plaintiff. As the judgment is reversed upon another ground it is not necessary to decide the question presented by this assignment, for the reason that the same question will not necessarily arise upon another trial.

The ninth assignment of error complains of the refusal to give the sixth instruction requested by the defendant as follows: "If you should find that the plaintiff is entitled to any damages, you should state how much, and in making up your

verdict you can only find such actual damages as may be proved by the evidence. You cannot find any exemplary or punitive damages." The bill of exceptions states that "said charge was predicated upon the following state of facts: There was an entire absence of any willful or culpable negligence on the part of the defendant company that would justify exemplary or punitive damages; that the only evidence of any negligence at all [293] on the part of the company's agents was the failure of the engineer to see the signal which was claimed to have been given by the plaintiff switchman; and it further appearing from the testimony of the engineer that he was looking out for the signal at all times, and that no signal was given, and that he slowed up the train, as was understood between himself and the switchman before the switching was done." According to the bill of exceptions and the record before us, the court gave no instructions as to the measure of damages, or upon the subject of damages, except to say that "if you find a verdict for the plaintiff, the form of verdict should be 'We, the jury, find for the plaintiff and assess his damages at $; here insert the amount you find, not exceeding $10,000." The defendant had a right to have the court give the instructions requested, confining the jury to a verdict for actual or compensatory damages to be based upon the evidence. The general charge did not confine the jury to compensatory damages, nor even to damages proven by the evidence, but authorized them to find an amount not exceeding that claimed in the declaration. Because of the general character of this charge it was peculiarly appropriate that the requested instruction be given in order that the jury should understand not only that their estimate should not include punitive damages, but that it should be based upon actual damage shown by the evidence. The statement of facts following the refused instruction shows an entire absence of any testimony tending to authorize the infliction of punitive damages, and this being so, it was not improper that the court should instruct the jury that no such damages should be allowed: Chicago etc. R. R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Louisville etc. R. Co. v. Hall, 87 Ala. 708, 13 Am. St. Rep. 84, 6 South. [294] 277, 4 L. R. A. 710. The rule in this respect would be different if there was any evidence whatever tending to show that punitive damages could be properly inflicted, even though the court might be of opinion that the preponderance of the evidence was the other way, for in such

case the court should, under proper instruction, leave the question to be decided by the jury like any other fact depending upon the conflicting testimony. But where there is no evidence tending to show negligence of so gross a character as to warrant the infliction of punitive damages as is shown to be the case here by the predicate of facts following this refused instruction, the court should not refuse an appropriate instruction withdrawing such question from the consideration of the jury. What is here said is not intended to deny the rule announced in Florida Cent. etc. R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338, that the jury are to exercise a reasonable discretion as to the amount of damages to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information; nor is it now decided that if correct instructions are given as to the measure of damages to be awarded, error can be predicated upon the refusal to give an instruction that the jury cannot award exemplary or other special items of damage, not properly recoverable in a particular case, even though the general instructions do not specially mention and exclude such improper items. The matter decided is that where no instructions are given as to the measure of damages, it is error to refuse a correct instruction requested confining the jury to the proper measure and to the evidence in ascertaining the amount.

The only other question presented is the sufficiency of [295] the evidence to support the verdict, and as a new trial must be had, the court refrains from expressing an opinion upon that question.

The judgment is reversed and a new trial granted.

When there are Two or More Methods by which an employé may perform his duties and he voluntarily chooses the most hazardous, knowing it to be such, he ordinarily does so at his own risk. Still, the fact that there was a safer method by which an employé could have done his work is not necessarily conclusive against his right to recover for injuries sustained: See the monographic note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 895.

ROPES v. JENERSON.

[45 Fla. 556, 34 South. 955.]

EQUITY PRACTICE.—On a hearing upon bill, answer, and replication, after the time for taking testimony had expired, every allegation in the answer responsive to the bill is taken to be true. (p. 80.)

EQUITY PRACTICE.—If one seeks to set aside a conveyance of land as fraudulent, and rests his equity upon the vacant character of the land, an answer under oath that defendant is in possession of the land is responsive to the bill, and, in the absence of evidence, establishes that the land is occupied adversely. (p. 80.)

EXECUTION SALES—Action by Purchaser to Set Aside Prior Conveyance.—A court of equity cannot entertain a suit by a purchaser of land at execution sale, who is not in possession, against a person who is in possession, to set aside a prior conveyance made by the judgment debtor, as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors. The complainant's remedy is at law only. (p. 80.)

EQUITY—Erroneous Judgment.—Upon a hearing of a bill in equity, and after ascertaining that there is no equity in such bill, it is error to entertain a decree adjudging the title to the land in controversy to be in the defendant, and to be his homestead. In such case the bill should be dismissed without more. (p. 81.)

E. E. Ropes, in propria persona, for the appellant.

557 COCKRELL, J. Appellant, as complainant below, filed his bill against the appellees to set aside as voluntary a certain conveyance of real estate made by T. L. Jenerson and wife Sophronia to S. R. Causey, and by the said Causey to the said Sophronia, and also a conveyance of other realty by the said T. L. Jenerson and wife to their son, O. L. Jenerson. He averred the recovery of a judgment in another county against the said T. L. Jenerson about one year prior to these conveyances and that all parties had notice thereof, and that since said conveyances execution had been sued out upon said judgment and appellant had become the purchaser of said lands at a sheriff's sale thereunder. Service was had upon O. L. Jenerson and S. R. Causey, and a decree was entered May 15, 1895, ordering the said O. L. Jenerson to deliver up his deed for cancellation. Three years thereafter T. L. Jenerson and wife appeared and demurred to the bill, whereupon the said Ropes amended by averring that the said lands were unoccupied, that the defendants T. L. Jenerson and wife were not in Florida when the suit commenced, and had no agent or attorney upon whom service of process could be made, and that said land was not in the possession of any person

against whom an action of ejectment could be brought. Thereupon the said T. L. Jenerson and wife answered under their several oaths, among other things, that they were in actual possession of the lands so conveyed to Sophronia, occupying it as their home at the time the bill was filed and had continued so to occupy it; that said land was their homestead before the bringing of the original common-law action and had been ever since. They admitted that at the time the bill was filed they were [558] temporarily absent from the state. Replication was filed and after the time for taking testimony had expired the appellant set the cause down for final hearing on bill, answer and replication. A decree was thereupon entered decreeing the land so conveyed to the said Sophronia to be the homestead of said T. L. Jenerson and his wife, the said Sophronia, and dismissing the bill as to this; the former decree ordering the deed to O. L. Jenerson canceled was confirmed, and the costs since the former decree were taxed against the complainant. O. L. Jenerson is not objecting here to the several decrees.

On a hearing upon bill, answer and replication, after the time for taking testimony has expired, the rule is that every allegation in the answer responsive to the bill is taken as true: Kellogg v. Singer Mfg. Co., 35 Fla. 99, 17 South. 68. The equity of the bill was rested by the complainant upon the allegations that the land in controversy was unoccupied and there was no one in possession against whom ejectment would lie. There is no claim whatever that he was himself in possession, and his failure to test the right to the possession at law was based upon the alleged vacant character of the land. The answer squarely met this equity by averring the actual occupancy thereof by the defendants as a home. The only evidence as to its character was that given in the sworn answer, and it may be, therefore, taken as established that the land was occupied adversely.

A court of equity cannot entertain a suit by a purchaser of real estate at execution sale, who is not in possession, against a party who is in possession, to set aside a prior conveyance made by the judgment debtor as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors. If the conveyance sought to be set aside was fraudulent, it was void as to creditors, [559] and the complainant by his purchase acquired the legal title, and has a plain, adequate and complete remedy at law: Morrison v. Marker, 93 Fed.

692; United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. Rep. 991, 30 L. ed. 110; Smith v. Cockrell, 66 Ala. 64.

The bill as to this land was, therefore, properly dismissed, but the court should have stopped here. Having ascertained there was no equity in the bill, there should not have been a decree adjudging the title to be in the defendants and that such land constituted their homestead.

The final decree from which this appeal is taken, in so far as it adjudges the lands therein described to be the homestead of T. L. Jenerson and Sophronia Jenerson, his wife, is reversed, and in all other respects it is affirmed. The costs of this appeal will be taxed against T. L. Jenerson.

RIGHT OF PURCHASER AT EXECUTION SALE TO PROCEED IN EQUITY TO SET ASIDE A FRAUDULENT TRANSFER BY THE JUDGMENT DEBTOR.*

The weight of authority is opposed to the rule announced in the principal case, as a large majority of the decided cases maintain that a court of equity has jurisdiction, at the suit of a purchaser at execution sale, who has received a sheriff's deed for the land sold, to annul and set aside, as a cloud upon the title, a deed of the land given by the judgment debtor, without consideration, and to defraud his creditors. In this regard it makes no difference whether the purchaser at the execution sale be the judgment creditor or a third person as their rights, as to the equitable remedy, are the same: Hager v. Schindler, 29 Cal. 47; Stock-Growers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444; Murphy v. Orr, 32 Ill. 489; Gould v. Steinburg, 84 Ill. 170; Frakes v. Brown, 2 Blackf. 295; Harrison v. Kramer, 3 Iowa, 543; Gallman v. Perrie, 47 Miss. 131; Ryland v. Callison, 54 Mo. 513; Rinehart v. Long, 95 Mo. 396, 8 S. W. 559; Sands v. Hildreth, 14 Johns. 493; Bergen v. Carman, 79 N. Y. 146; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Wagner v. Law, 3 Wash. 500, 28 Am. St. Rep. 57, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784; Orendorf v. Budlong, 12 Fed. 24. Thus if a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser has the right to impeach the conveyance in equity and is not bound to bring ejectment: Bergen v. Carman, 79 N. Y. 146. Or the purchaser of lands on sale under execution, after the expiration of a year from the day of sale without redemption, acquires an equitable title, which entitles him to maintain an action for the cancellation of instruments, which within the definition of the courts of equity are clouds on title: Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

*REFERENCE TO MONOGRAPHIC NOTE.

Removal of cloud on title: 45 Am. St. Rep. 373-378.

In Orendorf v. Budlong, 12 Fed. 24, it was decided that a court of equity has concurrent jurisdiction with a court of law to set aside deeds to real estate made to hinder, delay, and defraud creditors, and that this jurisdiction may be invoked by a judgment creditor either before or after sale upon execution, and that a purchaser under the execution has the same right in this respect as a judgment creditor.

In the well-considered case of Wagner v. Law, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784, the court, after an exhaustive review of the authorities, reached the conclusion that a judgment creditor who is also the execution purchaser, may maintain an action in equity to set aside a fraudulent conveyance of the land purchased, made by the judgment debtor, and to quiet the title acquired at the execution sale. The right to maintain such suit is not affected by the fact that the land was purchased by the judgment creditor for a trifle, because of the existence of such fraudulent conveyance.

In deciding that a court of equity has jurisdiction at the suit of a judgment creditor who has purchased land at execution sale, to annul and set aside, as a cloud upon his title, a deed of the land given before the recovery of the judgment by the judgment debtor, without consideration, and to defraud the creditor, the court said in Hager v. Schindler, 29 Cal. 47: "It is not enough that the plaintiff could have established his title in an action of ejectment. Before the case can be considered as beyond the reach of a court of equity, it must be made to appear that the legal remedy would be adequate and complete. The appeal here is to that branch of concurrent jurisdiction in which the peculiar remedy afforded by courts of equity constitutes the principal ground of jurisdiction. The relief asked is that certain deeds alleged to be fraudulent may be canceled by decree. The bill is brought upon the principle of quia timet; that is, for fear that the deeds may be vexatiously or injuriously used against the plaintiff when the evidence to impeach them may have been lost. The justice invoked is not remedial so much as precautionary or preventive. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it since he can retain it only for some sinister purpose. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title, and it is always liable to be applied to improper purposes. Preventive justice is what is needed, and a court of law has no power to administer it."

And in Stock-Growers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444, decided the same way, the court said: "A judgment creditor desiring to set aside a supposed fraudulent deed of real estate may bring his action therefor to test the validity of the deed before attempting to subject the premises to execution sale; or the purchaser after such sale may bring his action to remove the cloud from the title by

canceling the supposed fraudulent deed, and to recover possession of the premises."

In Gallman v. Perrie, 47 Miss. 131, it was said that "the jurisdiction of a court of equity is ample, either before or after a sale under a judgment to set aside a deed made in fraud of creditors; before the sale, in order that the creditor may realize the full value of the property by offering an unembarrassed title to bidders; after sale, so that the clouds which obscure the title, and which, if permitted to remain, might endanger it, may be put away."

In Ryland v. Callison, 54 Mo. 515, the court declared that "the law is well settled in this state that where a debtor conveys his land with the fraudulent design above mentioned, a resulting trust is thereby created in favor of his creditors, and is the subject of execution sale. And it is equally well settled that a purchaser at such sale will occupy as advantageous a position as though he were a creditor when proceeding to set aside the debtor's conveyance on the ground of fraud.

In Rinehart v. Long, 95 Mo. 396, it was decided that a purchaser at an execution sale of land was entitled to relief in equity to set aside a deed made by the judgment debtor in fraud of creditors. In delivering the opinion in this case, the court said that "it is the well-established law, that a purchaser at an execution sale occupies the same position and has all the advantages of the judgment creditor when he seeks to set aside or defeat a fraudulent conveyance made by the judgment debtor: Rinehart v. Long, 95 Mo. 401.

Notwithstanding that the doctrine announced in the foregoing citations is that of the great majority of the cases, there is a respectable line of authority which maintains an exactly contrary doctrine and announces the correct rule to be that a purchaser of land at an execution sale, whether he be the judgment creditor, or a third person, under an execution against a debtor who has fraudulently conveyed the land to his vendee, has a plain, adequate, and complete remedy at law by ejectment, and cannot, while out of possession, maintain a bill in equity to cancel the fraudulent conveyance as a cloud upon his title. This rule is generally based on the doctrine that the jurisdiction of a court of equity cannot be maintained to remove a cloud from the title unless the person complaining has both the legal title and the possession. If the possession is in another, his remedy, and the only proper remedy, is by an action in ejectment: Smith v. Cockrell, 66 Ala. 64; Betts v. Nichols, 84 Ala. 278, 4 South. 195; Teague v. Martin, 87 Ala. 500, 13 Am. St. Rep. 63, 6 South. 362; Helden v. Hellen, 80 Md. 616, 45 Am. St. Rep. 371, 31 Atl. 506; Messmore v. Huggard, 46 Mich. 558, 9 N. W. 853; Cranson v. Smith, 47 Mich. 189, 10 N. W. 194; Thigpen v. Pitt, 1 Jones Eq. 49; Morrison v. Marker, 93 Fed. 692. The exact point decided in Helden v. Hellen, 80 Md. 616, 45 Am. St. Rep. 371, 31 Atl. 506, is that one claiming title to land under purchase at execution sale cannot maintain a bill in equity against a person in possession

claiming under a trust deed, to have such deed declared void and vacated as a cloud on his title. His remedy is by an action in ejectment. In Morrison v. Marker, 93 Fed. 962, it was maintained that a circuit court of the United States, as a court of equity, could not entertain a suit by a purchaser of real estate at execution sale who was not in possession, to set aside a prior conveyance made by the judgment debtor as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors, although such a suit is permitted by a state statute. If the conveyance sought to be set aside was fraudulent, it was void as to creditors, and the complainant, by his purchase, acquired the legal title, and had a plain, adequate and complete remedy at law, by an action of ejectment. While these cases refuse to entertain jurisdiction in equity, because the complainant, holding the legal title, is out of possession, and hence must be remitted to his remedy at law by ejectment, the cases which maintain the contrary doctrine hold that the fact that he is out of possession is no obstacle to equitable relief. Thus in Hager v. Schindler, 29 Cal. 48, and Stock-Growers' Bank v. Newton, 13 Colo. 249, 22 Pac. 444, it is maintained that a judgment creditor or other person purchasing land at an execution sale need not be in possession of the land, to enable him to maintain a suit in equity, after he has a sheriff's deed, to cancel a deed of the land given by the judgment debtor to defraud his creditor before he recovered judgment.

DAUGHTREY v. STATE.

[46 Fla. 109, 35 South. 397.]

PRINCIPAL AND ACCESSARY.—An accessary before or after the fact may be indicted separately from the principal either before or after the conviction of the latter. If before, the indictment must aver the principal's guilt; if after, it may allege either the guilt of the principal, or that he has been convicted without averring his guilt. (p. 85.)

PRINCIPAL AND ACCESSARY.—The conviction of the principal is an essential prerequisite, except in certain cases, to the punishment of the accessary, and the conviction required includes a judgment of conviction, and not merely the verdict of a jury. (p. 86.)

PRINCIPAL AND ACCESSARY.—An Indictment against an accessary which fails to allege the guilt of the principal, and which merely alleges that he was duly convicted by a jury, is fatally defective, in failing to allege a judgment of conviction against the principal. (p. 86.)

Sparkman & Carter and Wilson & Wilson, for the plaintiff in error.

J. B. Whitfield, attorney general, for the state.

[109] CARTER, P. J. Plaintiff in error was indicted, tried and convicted in the circuit court of DeSoto county upon an [110] indictment purporting to charge him as an accessary before as well as an accessary after the fact to the felony of larceny.

Several assignments of error question the regularity of the term of the court at which the indictment was found and the trial had, but these assignments depend upon the same facts as do similar questions raised in the case of Peeples v. State, decided at this term, and are disposed of by the decision in that case.

The indictment does not charge the guilt of the alleged principal, but merely that he had been convicted of the principal felony at a former term of the court. The allegation with respect to the conviction is "that heretofore, to wit, at the fall term of the circuit court of the sixth judicial circuit of the state of Florida sitting in and for the county of DeSoto aforesaid for the year A. D. 1902, one Melvin Corbett was by the name of said Melvin Corbett duly convicted by a jury of said circuit court aforesaid for that," etc., reciting the allegations of the indictment against Corbett. This is the form given by Mr. Bishop (Bishop's Directions and Forms, sec. 117) except that the words "by a jury of said circuit court aforesaid," following the word "convicted," do not appear in Mr. Bishop's form. The defendant moved to quash the indictment, one ground being based upon the use of the qualifying words "by a jury," etc. The court denied the motion, and the second assignment of error questions the propriety of this ruling. Mr. Bishop states that the accessary may be indicated separately from the principal either before or after the latter's conviction. If before, the indictment must aver the principal's guilt. If after, the indictment may allege either the guilt of the principal, or that he has been convicted without averring his guilt: Bishop's Directions and Forms, sec. 117; 2 New Criminal Procedure, sec. 11. In this case the pleader adopted the latter course, i. e., alleging the conviction without averring the guilt of the principal. The allegation is that the principal was duly convicted "by a jury," etc. Is this allegation [111] sufficient, notwithstanding the use of the qualifying words "by a jury," etc.? In order to determine this it will be necessary to ascertain what is included in the term "conviction," within the meaning of the rule authorizing the conviction of the principal to be alleged in indictments of this char-

acter. By the common law, and in this state, the conviction of the principal is an essential prerequisite (except in cases not necessary to be noticed) to the punishment of the accessary: Bowen v. State, 25 Fla. 645, 6 South. 459; Ex parte Bowen, 25 Fla. 214, 6 South. 65. And the conviction required includes the judgment of conviction, and not merely the verdict of the jury: 1 Bishop's Criminal Law, sec. 668; 2 Bishop's New Criminal Procedure, sec, 12; 1 Wharton's Criminal Law, sec. 237; 1 McClain's Criminal Law, sec. 216. We think, therefore, that in indictments of this character the allegation must be broad enough to include the judgment or sentence of conviction (Bishop's Directions and Forms, sec. 94; Smith v Commonwealth, 14 Serg. & R. (Pa.) 69), and not merely the verdict of the jury. If the qualifying words "by a jury," etc., had been omitted from this indictment, we are not prepared to say that the allegation "was duly convicted" would not be sufficient to include the judgment of conviction, and consequently to require proof of the judgment in order to prove the allegation, but we think the additional words "by a jury," etc., qualify the meaning of the word "convicted," and confine its meaning to a mere conviction by the verdict of a jury, which is sufficient. In other words, this allegation would be sustained by proof of a verdict of guilty, though no sentence had been passed, or a new trial had been granted.

The judgment is reversed with directions that the circuit court grant the motion to quash.

Maxwell and Cockrell, JJ., concur.

Taylor, C. J., and Hocker and Shackleford, JJ., concur in the opinion.

An Accessary cannot, by the common law, be brought to trial, without his own consent, till the guilt of his principal is legally ascertained by conviction or outlawry, unless they are tried together: Stoops v. Commonwealth, 7 Serg. & R. 491, 10 Am. Dec. 482. But an accessary can be tried before the principal, if the law makes the offense of each a separate and distinct crime: Stone v. State, 118 Ga. 705, 98 Am. St. Rep. 145. In McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232, an accessary was tried before the principal and found guilty; afterward, but before judgment, the principal was tried and acquitted. It was decided that the accessary should be discharged on motion.

COLBEY v. STATE.

[46 Fla. 112, 35 South. 189.]

ROBBERY.—Stealthily Filching Loose Property from the pocket of another, without using more force than is necessary to remove the property from such pocket, is not robbery, but larceny. (p. 88.)

ROBBERY—Taking Money from Pocket of Another.—If one struggles or clinches with another in an effort to overpower the latter, and for the purpose of enabling him to secure the money in the pocket of such other, he is guilty of robbery; but if the force thus used is merely in an effort to escape and avoid arrest, he is not guilty of robbery, although prior to such clinch he is stealthily attempting to filch the money from the pocket of such other. (pp. 88, 89.)

Pope & Pope, for the plaintiff in error.

J. B. Whitfield, attorney general, for the state.

112 CARTER, P. J. In January, 1903, plaintiff in error was convicted in the criminal court of record of Duval county upon an information charging him with an attempt to commit the crime of robbery. The information is somewhat inartificial and its sufficiency was questioned by a motion in arrest of judgment, but the evidence being in the opinion of the court wholly insufficient to support the verdict, and not likely to be different upon another trial, and the question of its sufficiency being properly presented by the assignment of error based upon the ruling denying the motion for a new 113 trial, it is not deemed essential to consider any other question.

From the evidence it appears that the alleged offense was committed on Thanksgiving night during Gala Week on November 27, 1902, in the city of Jacksonville, upon a street so crowded with people that one could not pass without coming in contact with others. Bousman, the prosecuting witness, testified that he and one Davidson were passing along the street when their attention was attracted to a fight in the street and a crowd rushing in that direction; that they were borne along with the crowd and while being pushed and jostled by the crowd he felt the defendant's hand in his pocket; that he caught the arm or hand and held it, calling to Davidson, who was several feet away, that his pocket was being picked and to come to his assistance; that Davidson came and took hold of the defendant whose hand was still in Bousman's pocket and delivered him into the custody of a

policeman, and that he, Bousman, had fourteen dollars and eighty cents in his pocket in paper and silver money. Davidson testified that he was several feet away when Bousman called him, but could see Bousman and the defendant together, looked like they were clinched, and that Bousman had hold of the defendant.

The policeman testified that he heard Bousman calling out from the crowd for a policeman; that he saw Bousman clinched with the defendant, and they appeared to be tussling with each other. This constitutes all the testimony tending to show the defendant guilty of a criminal offense.

The court is of opinion that this testimony does not sustain the conviction had in this case. Had the defendant succeeded in securing the money in Bousman's pocket, the facts would not sustain a conviction for robbery. Our statute, section 2398 of the Revised Statutes, provides that "whoever by force, violence or assault, or putting in fear, feloniously robs, steals and takes from the person of another money or other property which may be the subject of larceny [114] (such robber not being armed with a dangerous weapon) shall be punished," etc. The evidence does not disclose such force, violence, assault or putting in fear as is contemplated by the statute, but merely an attempt to furtively abstract from the pocket of Bousman money or other valuables supposed to be contained therein. This might constitute an attempt to commit larceny, but not robbery. Where one stealthily filches loose property from the pocket of another and no more force is used than such as may be necessary to remove the property from the pocket, it is not robbery under the statute, but larceny: Territory v. McKern, 2 Idaho, 759, 26 Pac. 123. See, also, the cases cited below.

From the evidence it appears that after Bousman became aware that defendant's hand was in his pocket, he caught the defendant by the arm calling upon Davidson and a policeman for assistance, and that a struggle ensued in which the parties clinched. If the defendant struggled or clinched with Bousman in an effort to overpower him for the purpose of enabling him to secure the money in the pocket, there would be such force as the statute contemplates, but the force used merely in an effort to escape from the grasp of Bousman or to avoid arrest would not be such force as is contemplated by the statute. We think the testimony shows clearly that the tussling or clinching spoken of by the witnesses occurred in an effort to escape from Bousman and to avoid arrest, and not in an

effort to secure the property. The testimony does not, therefore, support the conviction for an attempt to rob, and the court below erred in denying the motion for a new trial: Hanson v. State, 43 Ohio St. 376, 1 N. E. 136; Brennon v. State, 25 Ind. 403; State v. John, 5 Jones, 163, 69 Am. Dec. 777; Commonwealth v. Ordway, 12 Cush. 270; Rex v. Gnosil, 1 Car. & P. 504; 24 Am. & Eng. Ency. of Law, p. 997; 1 McClain's Criminal Law, sec. 469.

The judgment is reversed and a new trial awarded.

115 Maxwell and Cockrell, JJ., concur.

Taylor, C. J., and Hocker and Shackleford, JJ., concur in the opinion.

The Crime of Robbery is the subject of a monographic note to State v. McCune, 70 Am. Dec. 178-191. To constitute robbery, there must be force or intimidation, asportation without the consent of the owner, and an intent to steal: Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242; Jackson v. State, 114 Ga. 826, 88 Am. St. Rep. 60. As to whether robbery may be committed by snatching a purse from the hand of the owner, see Jones v. Commonwealth, 112 Ky. 689, 99 Am. St. Rep. 330; Smith v. State, 117 Ga. 320, 97 Am. St. Rep. 165.

TILLIS v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

[46 Fla. 268, 35 South. 171.]

PLEADING.—Demurrer does not Lie to a declaration because it claims other or greater damages than the case made legally entitles the plaintiff to recover. (p. 95.)

CONSTITUTIONAL LAW—Insurance.—A statute authorizing the recovery of a reasonable attorney's fee against life and fire insurance companies in suits upon policies issued by them is constitutional and valid. (p. 95.)

PLEADING—Insurance.—The execution of an insurance policy under seal is properly denied by the plea of non est factum. (p. 96.)

PLEADING—Demurrer.—A departure in pleading is a matter of substance and ground for a general demurrer. (p. 96.)

PLEADING—Insurance.—In declaring upon an insurance policy it is not necessary to allege performance of promissory warranties or conditions subsequent, but only of conditions precedent by general averment. (p. 96.)

PLEADING.—Promissory Warranties and conditions subsequent are matters of defense to be pleaded by the defendant, which the plaintiff need not anticipate and negative by averring performance. (pp. 96, 97.)

INSURANCE—Pleading.—Iron-safe Clause in a policy of fire insurance is a promissory warranty in the nature of a condition subsequent with which it is not necessary for plaintiff to allege a compliance. (p. 97.)

INSURANCE—Pleading—Iron-safe Clause—Waiver.—A breach of an iron-safe clause contained in a policy of fire insurance is a matter of affirmative defense to be set up by plea, and not a condition precedent, performance of which is required to be averred in the declaration and a replication alleging a waiver of such clause, or of a forfeiture accruing upon a breach thereof, is not a departure in pleading, although the declaration sets forth the iron-safe clause, and avers generally a compliance with all conditions precedent contained in the policy. (p. 97.)

INSURANCE—Fire—Iron-safe Clause—Waiver of Forfeiture.—If, after notice of a total loss under a fire insurance policy, and that it has been forfeited for noncompliance with an iron-safe clause contained therein, the insurance company, through its general agent, proceeds to adjust the loss, and upon such adjustment, finding that the loss far exceeds the amount of the policy, promises and agrees to pay the amount thereof, it thereby waives such forfeiture, and is bound by such waiver, and estopped to set it up to defeat collection to the amount agreed to be paid. (pp. 99, 100.)

INSURANCE—Forfeiture—Waiver.—A clause in a fire insurance policy that "the use of general terms or anything less than a distinct specific agreement clearly expressed and indorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction therein," may itself be waived, and if the insurer adjusts a loss, and promises and agrees to pay the policy after full knowledge of a forfeiture thereof by reason of the breach of a promissory warranty therein, this will constitute a waiver binding on the insurer, although such waiver is not indorsed on the policy. (p. 100.)

B. A. Thrasher, for the plaintiff in error.

A. W. Cockrell & Son, for the defendant in error.

270 CARTER, J. In August, 1897, plaintiff in error began an action against defendant in error in the circuit court of Alachua county. The declaration, containing one count, alleged that defendant issued its policy of insurance under seal to plaintiff, whereby it insured plaintiff in the sum of eighteen hundred dollars against loss or damage by fire, upon his stock of general merchandise while contained in a certain store building at Rochelle, for the period of one year from September 7, 1896. The declaration set forth the policy at length and alleged that plaintiff at the time it was issued, and from thence until the happening of the loss and damage, was the sole and absolute owner of the property; that on February 2, 1897, the property insured was totally consumed and destroyed by fire, whereby plaintiff sustained loss and damage to the property to the amount of two thousand eight hundred and eighty-six dollars and thirteen cents; that forthwith, after the happen-

ing of said loss, plaintiff gave notice thereof to the defendant, and the defendant through its agent came to where said property was destroyed, made an adjustment of said loss, expressed itself through said agent to be perfectly satisfied concerning said loss; found that plaintiff had sustained a loss of two thousand eight nundred and eighty-six dollars and thirteen cents, and then and there agreed and promised to pay plaintiff the amount of money named and secured in said policy, to wit, eighteen hundred dollars.

The declaration also alleged that plaintiff had kept and performed all things in said policy contained on his part to be kept and performed, and although all conditions had been performed and fulfilled by him and all events and things [271] had happened to entitle him to a performance by defendant of its contract of insurance, yet the defendant, though often requested, had not paid plaintiff the sum due under said policy on account of the loss sustained, or any part thereof, but refused to do so.

Attached to and made a part of the policy as set forth in the declaration was what is known as the "iron-safe clause" in the following language: "The following covenant and warranty is hereby made a part of this policy: '1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void; 2. The assured will keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy; 3. The assured will keep such books and inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.' "

Defendant demurred to the declaration, but the demurrer was overruled, and thereafter plaintiff by leave of the court amended his declaration so as to claim an attorney fee of one hundred and ninety dollars, in addition to the eighteen hundred dollars claimed as damages for loss on the property.

[272] The defendant demurred to the declaration as amended, the sixteenth, seventeenth and eighteenth grounds thereof being addressed only to the amendment, those grounds being in substance that the amendment was based wholly on state legislation, viz., chapter 4173, of the Acts of 1893, and that such legislation is in contravention of section 1 of the Declaration of Rights, constitution of 1885, as to equality before the law, and in contravention of section 1, article 14 of the constitution of the United States, in that it operates to deprive defendant of property without due process of law, and to deny defendant the equal protection of the laws. At the same time defendant moved to strike the amendment to the declaration upon the same grounds.

On February 26, 1898, the court made an order which, after reciting that the cause was submitted upon the defendant's demurrer to the amendment of the declaration, is as follows: "It seems to the court that the demurrer to the amendment of the declaration is well taken, and it is, therefore, considered and ordered that the said demurrer be and the same is hereby sustained, and said amendment of the declaration is stricken."

On March 11, 1898, the defendant filed eleven pleas, the first two of which were stricken upon motion of plaintiff. The others are substantially as follows: "3. That the alleged deed is not its deed; 4. That this defendant did not covenant with plaintiff as alleged; 5. That defendant never, through its agent or otherwise, made any adjustment of said loss, or expressed itself, through its agent, or otherwise, satisfied concerning said loss as alleged; 6. That defendant never then and there or at any other time or elsewhere agreed and promised to pay plaintiff the sum of eighteen hundred dollars, or any amount as alleged."

The seventh, eighth, ninth, tenth and eleventh pleas each begin with the statement that "it is not true as alleged [273] that plaintiff kept and performed all things in the policy contained on his part to be kept and performed; on the contrary, plaintiff did not keep and perform the certain covenant and warranty in said declaration styled the iron-safe

clause in the particulars, to wit," and assign separate breaches of that clause as follows:

"7. That plaintiff did not keep said set of books so as to clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments both for cash and on credit, as in said provision set forth.

"8. That the plaintiff had taken an inventory of said stock within twelve calendar months prior to the date of said policy, and did not take the inventory within thirty days of issuance of said policy, but nevertheless the plaintiff did not keep such a set of books from the date of said inventory as provided for during the continuance of said policy.

"9. The plaintiff did not keep the said last preceding inventory which in fact had been taken during the year next preceding the said fire in a fire-proof or iron safe at night when said building was not open for business, nor failing in that did the plaintiff keep said inventory in some place not exposed to a fire which would destroy said building.

"10. All the plaintiff's books from the date of said inventory as provided for, down to the first day of January, 1897, were in said building at night when said building was not open for business, and were then and there not in a fire-proof iron safe, and were then and there with said building destroyed by the said fire referred to in said declaration.

"11. Plaintiff failed to produce such set of books and inventories for the inspection of the defendant, notwithstanding this defendant requested of plaintiff an opportunity to inspect them straightway upon being notified as alleged of said fire, the plaintiff admitting that the fire occurred at night, when said building was not open for business, and that the last preceding inventory and his books covering said transactions prior to January 1, 1897, had been [274] kept in said building and not in a safe, and were destroyed by the same fire which destroyed said building."

Plaintiff moved to strike these pleas upon the ground that they were immaterial and irrelevant and not the pleas required by law, which motion was denied.

Plaintiff thereupon joined issue upon the third, fourth, fifth, sixth and seventh pleas. He replied to the eighth plea, admitting that he took an inventory within twelve calendar months prior to the date of the policy, and that he did not take an inventory within thirty days, alleging as a reason that the

policy did not so require, and averring that he did keep such a set of books from the date of the inventory as provided for while the policy remained in force. This replication was demurred to by defendant, but the demurrer was overruled and thereupon defendant joined issue upon it.

Plaintiff filed separate replications to the ninth, tenth and eleventh pleas, each admitting that he did not keep and perform the certain covenant and warranty in the declaration styled the iron-safe clause, in the particular mentioned in the plea to which the replication was addressed, and alleging that "the defendant after knowledge of the facts set forth in said plea waived said performance and forfeiture and treated said policy as obligatory and promised to pay the same."

The defendant demurred to the replications to the ninth, tenth and eleventh pleas, assigning points of law to be argued with respect to each replication, as follows: 1. It is a material departure from the declaration; 2. Declaration avers performance, replication admits nonperformance; 3. Waiver a legal conclusion; 4. No consideration for the promise; 5. The alleged avoidance does not suffice in law to defend against the confessed plea; 6. It does not appear plaintiff was misled to his prejudice. This demurrer was sustained August 4, 1898.

[275] On November 29, 1898, the court entered final judgment reciting that the defendant's demurrer to the plaintiff's sole replication to the ninth, tenth and eleventh pleas had been sustained; that said pleas were to the whole declaration and stood confessed of record, and that no application was made for leave to file an amended or new pleading, and adjudging that defendant go hence without day and recover its costs.

From the final judgment so entered plaintiff sued out this writ of error and assigns as error the following ruling of the court below: 1. Sustaining demurrer to amendment of the declaration and striking same; 2. Refusing the motion of plaintiff to strike defendant's pleas numbered 3, 4, 5, 6, 7, 8, 9, 10 and 11, and each of them; 4. Sustaining defendant's demurrer to plaintiff's replications to the ninth, tenth and eleventh pleas; 5. Entering final judgment for defendant.

The amendment of the declaration merely enlarged the claim for damages to be recovered, so as to include attorneys' fees, without the addition of a single allegation as to plaintiff's right to recover upon the cause of action alleged in the declaration. The demurrer to this amendment was based solely

upon the alleged unconstitutionality of the statute purporting to authorize the recovery of attorneys' fees. A demurrer does not lie to a declaration because it claims other or greater damages than the case made legally entitles the plaintiff to recover, demurrer not being the proper pleading by which to test the extent of the recovery. It was, therefore, error to sustain the demurrer to the amendment of the declaration: Cline v. Tampa Waterworks Co., 46 Fla. 459, 37 South 9, decided [276] at this term. A motion was made, however, to strike the amendment on the same grounds, and while the order of the court does not in terms purport to sustain the motion to strike, it does in fact strike the amendment. In Jacksonville etc. Ry. Co. v. Griffin, 33 Fla. 602, 15 South. 336 this court held that the fact that a count of a declaration may set up many elements that do not enter into the measure of damages is not ground of demurrer, but it may be cause, under section 1043 of the Revised Statutes, for reforming the count as calculated to embarrass the fair trial of the cause. Whether the amendment in this case could properly be regarded as calculated to embarrass the fair trial of the cause within the meaning of the statute we shall not stop to inquire, for whether so or not, it is clear that if attorneys' fees could properly be recovered, the court was in error in striking the amendment upon the grounds stated in the motion. Chapter 4173, act approved June 2, 1893, provides in its first section "that upon the rendition of a judgment or decree by any of the courts of the state against any life or fire insurance company in favor of the holder or holders of any policy of insurance written by such company there shall be adjudged or decreed against such insurance company and in favor of the holder or holders of such policy a reasonable sum as fees and compensation for his or their attorneys or solicitors prosecuting the suit in which the recovery is had." It is not denied that if this statute is consistent with the provisions of the state and federal constitutions mentioned in the motion to strike, the motion should have been denied, and we find no reason to doubt that it is. The principles announced in the case of Farmers' etc. Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. Rep. 565, 47 L. ed. 821, and other cases therein referred to control this case, and we are constrained to hold the statute valid as against the objections urged. The court erred, therefore, in striking the amendment of the declaration.

[277] 2. The only argument under the second assignment of error relates to the refusal to strike the third and fourth pleas. If we construe the declaration as declaring upon the policy, the third plea was proper, because the declaration expressly alleged that the policy was under seal. The execution of this sealed instrument was properly denied by the third which was a plea of non est factum, and there was no error in refusing to strike it: Circuit Court Common Law Rule No. 67.

The fourth plea was not a proper plea even if, as contended by defendant, the action was upon a covenant under seal, for the reason that under rule No. 67 above referred to the proper plea is non est factum. The court should have granted the motion to strike that plea.

3. The demurrer to the replications of plaintiff to the ninth, tenth and eleventh pleas was based upon several grounds. The first two contend that the replications are departures from the declaration, and are, therefore, subject to general demurrer. A departure in pleading is a matter of substance, and ground for general demurrer: Tarleton v. Wells, 2 N. H. 306; Pease v. McKusick, 25 Me. 73; Pollard v. Taylor, 2 Bibb, 234; Keay v. Goodwin, 16 Mass. 1; 1 Chitty on Pleadings, 678. The defendant in error contends that the declaration alleges performance of all things to be performed by the plaintiff in general terms; that the pleas traverse this general allegation by alleging specifically nonperformance of the iron-safe clause; that the replications, instead of denying the allegations of the pleas, admit them and set up excuses for nonperformance though the declaration alleges performance, and, therefore, the replies constitute departures. We infer from the citation of an authority in the order of the circuit judge upon the demurrer that he sustained it upon these grounds, but the order being general, this court cannot reverse his ruling if it finds that any ground of demurrer was good. In order to determine whether the replications constitute departures in pleading [278] it will be necessary to ascertain what allegations of the declaration were material, treating it as a declaration upon the policy. In declaring upon an insurance policy it is not necessary to allege performance of promissory warranties or conditions subsequent, but only of conditions precedent which may, under section 1045 of the Revised Statutes, be by a general averment. Promissory warranties and conditions subsequent are matters of defense to be pleaded by the defendant, and it is not necessary that the plaintiff anticipate such

defenses and negative them by averring performance: Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591; Chambers v. Northwestern Mut. Life Ins. Co., 64 Minn. 495, 58 Am. St. Rep. 549, 67 N. W. 367; Forbes v. American etc. Ins. Co., 15 Gray, 249, 77 Am. Dec. 360; Johnston v. Northwestern Livestock Ins. Co., 94 Wis. 117, 68 N. W. 868; Insurance Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140; Whipple v. United Fire Ins. Co., 20 R. I. 260, 38 Atl. 498; 2 May on Insurance, sec. 590; 4 Joyce on Insurance, sec. 3684. The iron-safe clause in this case was a promissory warranty in the nature of a condition subsequent, and it was not necessary to allege a compliance with its terms in the declaration: Western Assur. Co. v. Redding, 15 C. C. A. 619, 68 Fed. 708; Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; Copeland v. Western Assur. Co., 43 S. C. 26, 20 S. E. 754. In Levy v. Peabody Ins. Co., 10 W. Va. 560, 27 Am. St. Rep. 598, it was even held that an allegation that plaintiff had on his part performed all conditions of the policy meant conditions that had not been waived, and that if defendant pleads that a certain specified condition has been violated by the plaintiff, plaintiff may reply a waiver. It is not necessary to approve the rule laid down in the West Virginia case, as under the principles announced above the allegations of the declaration in regard to performance must be construed with respect to conditions precedent, and as compliance with the iron-safe clause is not a condition precedent, but a promissory warranty in the nature of a condition [279] subsequent, it is not embraced within the allegations of performance contained in the declaration: Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762. Even if we construe the declaration as alleging performance of that clause, such allegation may be rejected as surplusage: Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 South. 473. It results, therefore, that as a breach of the iron-safe clause was a matter of affirmative defense to be set up by plea, and not a condition precedent, performance of which was required to be averred in the declaration, it was entirely proper for the plaintiff to reply a waiver, as by so doing he was not departing from the allegations of the declaration in any material matter: 1 Chitty on Pleadings, *674.

Other grounds of demurrer claim that the alleged waiver is pleaded as a legal conclusion, that it is not alleged to be supported by a consideration and that facts are not alleged show-

ing that plaintiff was misled to his prejudice. It appears from the declaration that plaintiff gave defendant immediate notice of the loss; that defendant's agent came to where the property was destroyed, made an adjustment of the loss, expressed himself satisfied concerning it, found that plaintiff had sustained a loss of two thousand eight hundred and eighty-six dollars and thirteen cents, and thereupon then and there agreed and promised to pay plaintiff the amount of money secured to be paid by the policy. These allegations of the declaration are not denied by the ninth, tenth and eleventh pleas, and the replications allege that after knowledge of the breach of the iron-safe clause the defendant promised to pay the policy. These allegations do not set up waiver as a legal conclusion, but aver the fact to be that defendant promised to pay the policy after knowledge of the breach of the iron-safe clause. The object and purpose of the iron-safe clause was to enable the defendant to secure reliable data upon which to base an adjustment of the loss. These pleas do not deny that plaintiff had kept books and the inventory as required, but alleged merely that they were not kept in the proper place and that they were not [280] produced because burned by the fire that destroyed the building. As the books and inventory were necessary or useful only in the matter of the adjustment, it must be assumed that defendant knew of their destruction and the breach of the iron-safe agreement when it came to adjust the loss, and the eleventh plea so alleges, yet according to the allegations of the declaration which these pleas do not deny, and of the replications, the defendant adjusted the loss and agreed and promised to pay the policy after notice of this breach of the agreement which under the policy wrought a forfeiture. It cannot be assumed that the agent could have adjusted the loss without causing the plaintiff some trouble or inconvenience, but whether so or not we think the conduct of the agent in adjusting and agreeing to pay the loss after knowledge of the facts which would have caused a forfeiture of the policy operates as a waiver of the forfeiture, and that the replications are good as against the demurrer. This court has recognized the doctrine of waiver as applicable to insurance policies in the case of Taylor v. Glens Falls Ins. Co., 44 Fla. 273, 32 South. 887, where it was held that a fire insurance company by unconditionally denying any liability whatsoever on its policy upon the destruction of the property cov-

ered thereby, waived proof of loss provided for in such policy. It is not always essential that the waiver be supported by a new consideration, nor that the facts be sufficient to constitute an equitable estoppel. Forfeitures are not favored in the law, and notwithstanding the strong language used in declaring the forfeiture that the policy "shall become null and void," the policy is not void, but voidable, and the party who has the right to declare it void may thereafter treat it as valid and it will be so: Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283, 35 South. 228; Oakes v. Manufacturers' Fire etc. Ins. Co., 135 Mass. 248; Viele v. Germania Ins. Co., 26 Iowa, 91, 96 Am. Dec. 83; Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 South. 399; Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; Titus v. [281] Glens Falls Ins. Co., 81 N. Y. 410; Corson v. Anchor Mutual Fire Ins. Co., 113 Iowa, 641, 85 N. W. 806; Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323. In the case of Gibson Electric Co. v. Liverpool etc. Ins. Co., 159 N. Y. 418, 54 N. E. 23, after reviewing quite a number of New York decisions, the court say: "Although the decisions of this court, of which we have made this brief review, seem to warrant the conclusion that an insurer, even under the provisions of a standard policy, may estop itself from claiming, or may waive, a forfeiture under its conditions by its acts and the requirements it makes of the insured after knowledge of the forfeiture, still the circumstances and acts which are required to constitute such an estoppel or waiver seem to be quite firmly established. Thus, in the absence of an express waiver, at least some of the elements of an estoppel must exist. The insured must have been misled by some act of the insurer, or it must, after knowledge of the breach, have done something which could only be done by virtue of the policy, or have required something of the assured which he was bound to do only under a valid policy or have exercised a right which it had only by virtue of the policy. Such an estoppel or waiver must be established by the person claiming it by a preponderance of evidence, and neither an estoppel, nor a waiver of the breach of a condition after forfeiture by reason thereof, can be inferred from mere silence or inaction." In this case, after notice of the fact constituting the forfeiture, the company proceeds to adjust the loss and upon such adjustment, finding that the loss far exceeds the amount of the policy, promises and agrees to pay the amount of the policy. If these acts do not constitute an

express waiver, they could only have been done by virtue of the obligation of a valid policy, and therefore the company, knowing of the forfeiture, by such acts waived it, and are bound by such waiver: Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220; City Planing etc. Mill Co. v. Merchants' [282] etc. Mut. Fire Ins. Co., 72 Mich. 654, 16 Am. St. Rep. 552, 40 N. W. 777; Eagan v. Aetna Fire etc. Ins. Co., 10 W. Va. 583; Levy v. Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W. 672; Farmers' etc Ins. Co. v. Chestnut, 50 Ill. 111, 99 Am. Dec. 492; Billings v. German Ins. Co., 34 Neb. 502, 52 N. W. 397; Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 South. 399; Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; Corson v. Anchor Mutual Fire Ins. Co., 113 Iowa, 641, 85 N. W. 806.

We are referred to a clause in the policy that "the use of general terms, or anything less than a distinct specific agreement clearly expressed and indorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction therein," but we do not see that such clause affects the question here. It is doubtful if it has reference to waivers of forfeitures made after a loss has occurred, as its language seems applicable to waivers of the conditions or restrictions in the policy. But however that may be, it is a clause which may itself be waived, and if the company adjusted the loss and promised to pay the policy with knowledge of the forfeiture, it will be bound, notwithstanding such waiver was not indorsed on the policy. The adjustment and unconditional promise to pay the loss with full knowledge of the forfeiture, with no reservation that the waiver was to be indorsed upon the policy, will bind the company to such waiver, notwithstanding the clause referred to.

The judgment of the circuit court of Alachua county is reversed and the cause remanded with directions to overrule the demurrer to and motion to strike the amended declaration, to grant the motion to strike the fourth plea, and to overrule the demurrer to plaintiff's replications to the ninth, tenth and eleventh pleas, and for such further proceedings [283] as may be conformable to law and consistent with this opinion.

Hocker, J., and Cockrell, J., being disqualified, took no part in the decision of this case.

A Statute Authorizing the Taxation of Attorney's Fees as costs when a judgment is rendered against an insurance company in an action on a policy covering real estate is constitutional: Farmers' etc. Ins. Co. v. Dabney, 62 Neb. 213, 97 Am. St. Rep, 624, and note.

Iron-safe Clauses in Policies of Insurance impose a condition subsequent: Hanover Fire Ins. Co. v. Crawford, 121 Ala. 258, 77 Am. St. Rep. 55. As to their force and effect in general, see Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 151, 105 Am. St. Rep. 916; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 90 Am. St. Rep. 98.

BRONK v. BRONK.

[46 Fla. 474, 35 South. 870.]

FUGITIVE from Justice—Appeal by.—The appellate court will not determine the correctness of the action of the lower court in issuing an injunction and writ of ne exeat, and render a decree therein, while the appellant, who has escaped from custody, and in defiance of the court and its writs, remains beyond its jurisdiction and renders it powerless to enforce any decree upon this feature of the case, which it might render. (pp. 103, 104.)

I. A. Stewart, J. W. Perkins and E. Bly, for the appellants.

J. D. Beggs, F. W. Marsh and G. B. Perkins, for the appellee.

[474] Per CURIAM. On April 19, 1901, appellee filed a bill in the circuit court of Volusia county against appellants, praying for maintenance, alimony and a writ of ne exeat against her husband, John P. Bronk, and an injunction against the fraudulent disposition of the property of John P. Bronk by him and his son, Frederick Bronk. A writ of ne exeat was allowed against John P. Bronk and he was taken into the custody of the sheriff on his failure to file the bond required, and an injunction was granted against the fraudulent disposition of the property of John P. Bronk by him and his son. John P. Bronk moved for a dissolution of the writs of ne exeat and injunction, and Frederick Bronk demurred to the bill. On a hearing of the motion and demurrer the court refused the motion and overruled the [475] demurrer. An appeal was taken by appellants to this court from the orders of the judge below.

A motion was made to dismiss the appeal as to John P. Bronk on the ground, first, that John P. Bronk is in contempt of the process of the court below, the issuance of which he is, in this cause, appealing from; second, that the said John P.

Bronk, by his escape from the custody of the sheriff of Volusia county, who held him under process in this case herein appealed from, and his flight without the state of Florida, cannot be heard to complain of the order for the issuance of such process.

The appellee further moved this court to dismiss the following assignments of error of said appellant, John P. Bronk, and strike the same from the files of this court, and to refuse to entertain the same, for the following reasons: The first, second, third, sixth and seventh assignments, for the reasons assigned as a cause for dismissing the appeal. The fifth assignment because it was shown on and by the record that said appellant has no interest in the order, and said appellant did not join in the demurrer, and has no appealable rights involved therein.

The motion was supported by the sworn return of the sheriff showing that John P. Bronk, who had been taken into his custody under the writ of ne exeat, had escaped therefrom and had withdrawn himself from the jurisdiction of the court.

On hearing, the court declined to dismiss the appeal of John P. Bronk, but continued that part of the motion relating to striking or refusing to entertain the assignments of error until the final hearing. The following are the assignments of error of John P. Bronk: 1. The court erred in its order and decree of April 19, 1901, granting a writ of ne exeat; 2. The court erred in granting writ of ne exeat without requiring bond of complainant, and without permitting defendant to be heard as to the ability of complainant to give bond; [476] 3. The court erred in granting writ of ne exeat prior to any decree awarding alimony; 4. The court erred in its order of April 19, 1901, granting temporary injunction against appellant; 5. The court erred in overruling the demurrer of Frederick Bronk to the bill of complaint; 6. The court erred in denying defendant's motion to dissolve the injunction and quash the writ of ne exeat; 7. The court erred in its order and decree of April 12, 1901, denying defendant's motion to dissolve the injunction and quash the writ of ne exeat, and remanding defendant to the custody of the sheriff.

This case having been reached for final disposition, it now appears by another sworn return of the sheriff that John P. Bronk has not returned to his custody, and is now out of the jurisdiction of this court. The appellant having, since he took this appeal, voluntarily placed himself in contempt of

the orders of the court below, and having gone beyond the jurisdiction of this court so that no order or decree it might make in the premises could be personally enforced against him, we are confronted with the question whether he has a right to a hearing on questions based on the injunction and ne exeat orders. Doubtless the general rule is that a party is not deprived of any strict legal right to be heard by placing himself in contempt of the court, especially if there be other means available by which the court may enforce its orders: Hovey v. Elliott, 167 U. S. 409, 428, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, and cases there cited. But the right to be heard upon appeal or writ of error has not been held to be one which a party cannot deprive himself of by his voluntary act of putting himself in contempt of the court by escaping from custody and evading the power and process of the law and the courts. It is distinctly held in the above-cited case, on pages 443 and 444, that such a question was not involved in that suit. In this state it is decided that an appellate court will refuse to hear a criminal case on writ of error, where the plaintiff in error [477] has escaped, and is not within the control of the court below, either actually by being in custody, or constructively by being out on bail: Woodson v. State, 19 Fla. 549. This case has been repeatedly followed in this court. The principle of those cases applies here. The court will not, at the instance of the appellant, determine the correctness of the action of the lower court in issuing the injunction and writ of ne exeat and render a decree therein while the appellant in defiance of the court and of its writs, remains beyond its jurisdiction and renders it powerless to enforce any decree upon this feature of the case which it might render. In the case of State v. Ackerson, 25 N. J. L. 209, the defendant had been arrested on a capias, and had suffered himself to be rescued, and had escaped from custody, it was held that he was in contempt and had no standing in the court whose process he resisted and whose authority he contemns, and is not entitled to be relieved by that court and that the appellate court would not interfere in a cause where the court below ought not and would not: Freese v. Swayze, 26 N. J. Eq. 437; Mussina v. Bartlett, 8 Port. (Ala.) 277; People v. Horton, 46 Ill. App. 434, 438. Governed by these views, we decline to entertain and hear the assignments of error of John P. Bronk, numbered 1, 2, 3, 6 and 7.

After the filing of the record here appellee suggested a diminution of the record and prayed for a certiorari to bring up a certain record of the circuit court of Volusia county, viz., the record in the case of John P. Bronk v. Annie T. Bronk, containing the proceedings in a divorce suit between John P. Bronk and a former wife, which record was used in evidence before the judge below when he passed upon the questions presented by this appeal. This court granted the certiorari on the authority of Caro v. Pensacola City Co., 19 Fla. 766. In obedience to the writ the judge below has certified that said record was used as evidence before him when he made the orders appealed from, and a copy thereof is here. A motion is now pending here on the part of appellants to strike this record [478] on various grounds, none of which are tenable. We therefore refuse to grant this motion.

These rulings dispose of all pending motions.

All the justices concur.

The Authorities are not entirely harmonious on the question whether a fugitive from justice loses his right of appeal: See State v. Plazencia, 6 Rob. 441, 41 Am. Dec. 271, and note. Some decisions hold that the fact that a party is in contempt does not deprive him of his right of appeal: People v. Horton, 46 Ill. App. 434; State v. Field, 37 Mo. App. 83; Hazard v. Durant, 11 R. I. 195; Ruhl v. Ruhl, 24 W. Va. 279.

GIVENS v. COUNTY OF HILLSBOROUGH.

[46 Fla. 502, 35 South. 88.]

COUNTY—BONDS—Curative Statute.—The adjudication by a court of competent jurisdiction that a proposed issue of county bonds is unauthorized and void, because of some irregularity of procedure, does not defeat the power and right of the legislature by a subsequent curative statute to authorize their issuance and sale. (p. 107.)

STATUTES—Classification of Counties.—A statute relating to counties of a certain class, general in its terms and founded upon a proper and legitimate basis of classification, is general and not special, though but one county is embraced within the class affected by the statute. (p. 109.)

COUNTY BONDS—Sale of—Notice.—The notice of sale of county bonds required by statute need not state that the bids therefor shall be payable in current funds, or in evidence of indebtedness of the county. (p. 110.)

COUNTY BONDS—Issuance—Injunction.—An allegation in a bill filed to enjoin the issuance of county bonds, questioning the regularity of the appointment of bond trustees for the proposed issue, affords no ground for enjoining the issuance of such bonds. (p. 110.)

F. M. Simonton and S. B. Turman, for the appellant.

Philips & Philips, Gunby & Gibbons and R. W. Williams, for the appellees.

503 MAXWELL, J. The county commissioners of Hillsborough county on the fourteenth day of August, 1901, passed a resolution for the issuance of county bonds to the amount of four hundred thousand dollars for building hard surface highways and funding the outstanding indebtedness of the county. An election was held which resulted in a ratification of this resolution by the legal voters of the county, and the bonds were prepared and advertised for sale and a bid therefor accepted by the county officials. In February, 1903, before the bonds were issued by the county to the successful bidder a decree was rendered by this court, reported in Hillsborough County v. Henderson, 45 Fla. 356, 33 South. 997, perpetually enjoining the proposed issue of bonds because of irregularity in the resolution of the board of county commissioners upon which the proposed issue was based.

In the month of April, A. D. 1903, the following act was passed by the legislature and approved by the Governor:

"An act to legalize and validate any county bonds heretofore favorably voted upon and afterwards advertised for sale by any county of the State of Florida for the purpose of constructing macadamized and other hard surface highways in such county and to fund the outstanding indebtedness of any such county, or for either or both such purposes, and to cure any and all defects therein, and to permit the sale thereof as now provided by law.

504 "*Be it enacted by the legislature of the State of Florida:*

"SECTION 1. Whenever any county bonds for the purpose of constructing macadamized and other hard surfaced highways in such county and to fund the outstanding indebtedness of any such county, or for either or both of such purposes, shall have heretofore been favorably voted upon at a county election held for such purpose, and afterward advertised for sale, such bonds be and they are hereby declared legal and valid, and they shall not be held invalid on account of any irregularity in the proceedings taken prior to the advertisement of said bonds for sale, and all defects or other irregularities in such proceedings are hereby cured and the sale of

such bonds is hereby authorized and permitted according to the provisions of Article 2, Chapter 2, Title 9, part 1 of the Revised Statutes of the State of Florida; and whenever any such bonds have been disposed of by the county authorities for value in accordance with said provisions of the Revised Statutes as subsequently amended, or have been offered for sale but have not been fully sold by delivery to the purchaser, then any and all such bonds so offered for sale or disposed of shall be of full force and effect and have the same validity as if no irregularity had occurred in the proceedings in regard to the issuance and sale of said bonds: provided always that this act shall not apply to any bonds issued by any county officer other than those authorized by said provisions of the Revised Statutes as so amended.

"SECTION 2. This act shall take effect immediately upon its approval by the Governor, or its becoming a law without such approval."

During the same session of the legislature a special act was also passed for the purpose of validating or authorizing the proposed issue of bonds, but this act it is not necessary to set out.

On the twenty-ninth day of May, 1903, the appellant Givens filed a bill setting up the above facts, and alleging that the county commissioners, purporting to act under the [505] authority of the statute above quoted, on the twenty-third day of April, 1903, met and advertised the sale of said bonds, and on the twenty-fifth day of May, 1903, after advertising the notice of sale as required by law, met for the purpose of receiving bids for the bonds, and accepted the bid of the defendant Trice for fifty of the bonds of the par value of one thousand dollars each, to be paid for in current money of the United States. The bill further alleged that the board of county commissioners was proceeding to carry out the proposed sale of the bonds, and threatening to deliver them to the said Trice, and that such action was illegal for various reasons alleged in the bill, and prayed that it be restrained by injunction from disposing of the bonds. The bill was afterward amended by alleging further grounds for holding the proposed issue of bonds to be illegal. A demurrer was filed to the amended bill, the demurrer was sustained, and the complainant refusing to amend, the bill was dismissed. From this decree the complainant appeals to this court.

This cause was argued before Division B, but as it involved a constitutional question, it was referred to the court in bank for decision.

In disposing of this case we shall confine ourselves to a consideration of those objections to the proposed issue of bonds which are insisted upon by the appellant in his argument, treating all other as abandoned.

1. The first objection urged to the power of the county to issue the bonds in question is "because the legislature of the state of Florida has no constitutional power to pass an act validating bonds that have already been declared null and void by a court of competent jurisdiction."

[506] The contention of the appellant is that such legislation is a usurpation of judicial power by the legislature, and in contravention of the distribution of governmental powers made by the constitution of the state. If the curative act were one to declare that construction to be given some existing instrument, or declaring that an instrument construed by the courts in one way should be construed in another, a different question would be presented from that with which we have to deal. Here no bonds were in existence, but it was proposed that certain bonds should be issued. The authority of the county officials to make the issue was questioned, and the court held that under the then existing conditions they were without such power. The curative act of the legislature did not question the correctness of this decision nor attempt to adjudicate the regularity of the previous acts of the county commissioners, but recognizing the binding force of the judgment of the court, undertook to confer authority where before there was none. The essential force of the act is contained in the clause, "the sale of such bonds is hereby authorized and permitted according to the provisions of article 2, chapter 2, title 9, part 1 of the Revised Statutes of the state of Florida."

This court has several times held such curative acts valid when passed before an adjudication by a court declaring the invalidity of the bonds: Middleton v. City of St. Augustine, 42 Fla. 287, 89 Am. St. Rep. 227, 29 South. 421; Potter v. Lainhart, 44 Fla. 647, 33 South. 251. The fact that the court has declared their invalidity does not affect the right of the legislature to create the new power: City of Jacksonville v. Basnett, 20 Fla. 525. As was said by the United States supreme court in the case of Utter v. Franklin, 172 U. S. 416, 19 Sup. Ct. Rep. 183, 43 L. ed. 498: "The fact that this court

had held the original Pima county bonds invalid does not affect the question. They are invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the [507] power originally given. The judgment in that case was res adjudicata only of the issue then presented, of the facts as they then appeared, and of the legislation then existing."

2. The second objection raised to the curative act of the legislature is that while in form a general act it is in fact special, and obnoxious to the provision of section 20 of article 3 of the constitution, which prohibits special legislation "regulating the jurisdiction and duties of any class of officers, except municipal officers." The contention that the act is special rests upon the allegations in the bill that it applies only to past transactions, and that it affects only Hillsborough county and these particular bonds; that Hillsborough county was the only county in the state attempting to issue bonds for the purposes mentioned, and that this was known to the legislature in passing the act, and that no other county in the state can at any time bring itself within the provisions of the act.

These allegations, of course, upon demurrer to the bill are to be taken as true. The question then presented is whether such legislation is special legislation for one county, or general legislation founded upon a reasonable and legitimate basis of classification, and if the latter, whether it will still retain this character though but one county is embraced within the class to which the act applies. The counties to which the act applies are those where the proposed issue has been favorably voted upon at a county election held for that purpose, and afterward advertised for sale; in other words, to counties where the proposed issue, even though characterized by some irregularity of procedure, is acceptable to the people of the county who have ratified it, and to the officials of the county who have proceeded to carry the public will into effect. This seems a reasonable basis of classification.

Whether legislation may be regarded as general though but one individual comes within its terms has been considered by this court on two previous occasions. The first of these was in the case of Ex parte Wells, 21 Fla. 280, [508] where the acts under consideration were chapter 3606 of the acts of 1885, entitled "An act to dissolve municipal corporations under cir-

cumstances therein stated and to provide provisional governments for the same," and chapter 3607, amendatory thereof. Not only was the city of Pensacola the only municipality in the state which came within the terms of those acts, but the necessities of that city had led to the enactment of the acts, as was recognized by the court, which said, "this court will not perpetrate an insincerity by denying that the reputed condition of that city led to its enactment." Yet the court held that as the classification was a reasonable one, that circumstances did not deprive the act of its character as general legislation, saying that it was "clear that the mere fact that there is but one of a class does not render legislation covering such class special," and citing many cases to sustain its ruling.

In that case, however, the act was not confined to then existing conditions or past transactions, and there was a possibility that other cities might thereafter be brought within the terms of the act, and upon this feature the appellant distinguishes that case from the case at bar.

This contention is disposed of by the later case of Bloxham v. Florida Cent. etc. R. Co., 35 Fla. 625, 17 South. 902, where the act under consideration was chapter 3558 of the acts of 1885, entitled "An act to provide for the assessment and collection of taxes on railroads and the properties thereof for the years 1879, 1880 and 1881, as to which there was no assessment." The classification of property made by this act and of owners affected by it was of railroads whose property had not been assessed for the years mentioned. No others were within its terms, and as it was based upon past conditions, none could thereafter by change of circumstance be embraced therein. The court held the basis of classification a proper one and the act general and not special, and that this was true even though the roads of but one company came within the act. "It might be that the railroads of the complainant is the only [509] property affected by the act. Such a state of affairs would not make it a special law. Speaking upon a similar contention this court has also quoted with approval in the case of Ex parte Wells, 21 Fla. 280, from the supreme court of New Jersey, the following language: 'A law so framed (i. e., general in its terms) is not special or local law, but a general law without regard to the consideration that within the state there happened to be but one individual of the class or one place where it produces effects.'" This case was upon appeal affirmed by the supreme court of the United States.

The principle underlying these decisions is sound. The basis of the division into classes must be one founded in reason, and not an arbitrary selection of individuals; but where the classification is well founded and the legislation general in terms, the mere incident that but one of the class exists should not defeat the right of the legislature to deal with the subject, nor tie its hands until a second individual shall be added to the class.

3. The notice of sale of the bonds, calling for bids therefor, published by the board of county commissioners did not state that the bids should be payable either in current money or in evidences of indebtedness of the county. This is urged as a ground for enjoining the issue of the bonds upon the theory that it prevented the sale of bonds at par to the holders of the outstanding indebtedness of the county. The statute does not require that the advertisement for bids should be framed as contended. On the other hand, it requires the bidders, who are presumed to act with some knowledge of the law and of their rights, to specify in their bid whether it is in current money or in evidences of indebtedness. The allegations in the bill upon this point seem framed upon the idea that such part of the bonds as may go to pay the outstanding indebtedness of the county cannot be sold below par. This, however, is not insisted upon in argument.

The bid made by Trice did not state the manner of payment contemplated, but this court has construed such a bid [510] as one payable in current funds (Potter v. Lainhart, 44 Fla. 647, 33 South. 251), and it was so accepted by the board. The bill alleges upon information and belief that the said bid, if finally accepted, will be paid in whole or in part by existing evidences of indebtedness of the county. This is said in the brief of counsel to be unlawful, but without further aid from them we are unable to find therein a basis for the injunction prayed.

4. The allegations in the bill questioning the regularity of the appointment of the bond trustees for the proposed issue of bonds concern only the proper disposition or administration of the proceeds of the bonds after they shall have been sold, and afford no ground for enjoining their issuance: City of Tampa v. Salomonson, 35 Fla. 446, 17 South. 581; Middleton v. City of St. Augustine, 42 Fla. 287, 89 Am. St. Rep. 227, 29 South. 421.

The decree of the court below is affirmed.

Curative Statutes are discussed in respect to their general nature and validity in the recent cases of Steger v. Traveling Men's Bldg. Assn., 208 Ill. 236, 100 Am. St. Rep. 225; Meigs v. Roberts, 162 N. Y. 371, 76 Am St. Rep. 322. The force or validity of a curative statute enacted subsequently to the institution of a suit based upon defects and irregularities intended to be cured by such statute, but prior to the judgment in such action, is not affected by such suit: Middleton v. City of St. Augustine, 42 Fla. 287, 89 Am. St. Rep. 227; Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280. If the legislature has power to authorize a municipality to issue bonds without submission of the question to an election by the taxpayers, it has power, by subsequent curative act, to declare that such election as was held was a sufficient predicate for the proper issuance thereof, even though such election was irregular and defective: Middleton v. St. Augustine, 49 Fla. 287, 89 Am. St. Rep. 227.

WILHELM v. LOCKLAR.

[46 Fla. 575, 35 South. 67.]

HOMESTEADS—Judgment Lien.—A judgment upon an indebtedness not constituting an obligation contracted for the purchase of a homestead is not a lien thereon. (p. 112.)

HOMESTEADS.—Exceptions in Constitutions rendering homesteads liable for obligations contracted for the purchase of the property must be strictly construed. (p. 112.)

HOMESTEADS—Purchase Money—Judgment Lien.—If one loans money to a purchaser of land and the latter uses it in paying off a note to a third person for the purchase money of his homestead, especially when the lender does not rely on the property for security, but takes a simple note therefor, and looks to the indorser on such note for payment, the transaction does not constitute an obligation contracted for the purchase of a homestead, and a judgment for the amount of the note is not a lien against such homestead. (p. 113.)

JUDGMENTS by Confession entered when no default has been taken, no declaration filed, no summons addressed or delivered, to a proper officer to serve, and when no appearance has been made by the plaintiff or defendant, are void and will not support a creditor's bill. (p. 115.)

Wilson & Wilson, for the appellant.

W. Hocker, for the appellees.

576 COCKRELL, J. This is an appeal from a decree setting aside as fraudulent certain deeds from one N. L. Langford to the Wilhelms and from the Wilhelms to Mary M. Tyre, then the wife of the said N. L. Langford. Upon application of the said Langford there has been allowed a severance and dismissal as to him. The realty involved consists of a lot one hundred and five by two hundred and forty-eight feet in

the town of Fort Myers, alleged in the answer to have been the homestead of the Langfords at the time of said conveyances.

We need consider but two questions in the case before us. Did the indebtedness to complainants' intestate constitute an "obligation contracted for the purchase of said property," and, secondly, was the judgment by confession sufficient to support a bill in equity, to set aside the conveyances as fraudulent?

The evidence establishes the fact that Mr. Langford was at the time of these conveyances entitled to a homestead in this lot, or if we concede Fort Myers to be an incorporated 577 town, to all but a small part thereof, and as to the part exempt it is wholly immaterial whether there has been an attempted transfer to the homesteader's wife. No judgment is a lien on said property, unless it come within the exceptions of the constitution: Murphy v. Farquhar, 39 Fla. 350, 22 South. 681.

Appellees seek to bring the case within the exceptions on the theory that the indebtedness "accrued by virtue of a loan of money to said N. L. Langford for the express purpose of paying the principal part of the purchase money required to purchase the said premises." The record before us, however, shows conclusively that Langford had already purchased the land of a third party for four hundred dollars cash and one thousand dollars on time, evidenced by note and finding he could secure a considerable discount for cash, obtained the money from appellees' intestate and paid off this note, before it matured, therewith; that the lender did not look to the land for the return of his money, though informed that it had been used to pay off this lien, but did look to the indorsement of Langford's brother on the note as the security for the loan. Can such a transaction bring about in the language of our constitution an "obligation contracted for the purchase of said property"?

While the precise point has not been decided by this court, yet a clear intimation has been given in construing the cognate exception "for the erection of improvements."

In Lewton v. Hower, 18 Fla. 872, it was held: "The provision of the constitution that the homestead may be liable 'for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon,' must be strictly construed: Olson v. Nelson, 3 Minn. 53. 'An

obligation contracted for the erection of improvements' is an obligation to pay for labor and materials bestowed and used in the construction of such improvements.

"An indebtedness for money borrowed to purchase materials, or to pay for labor bestowed in improving lands, or money expended in the purchase of such materials, or in [578] payment for such labor, is not an obligation contracted 'for the erection of improvements,' nor an obligation contracted for such labor, and is not within the exceptions of the constitutional provisions. The contract in such case is to repay money loaned or expended, and not a contract to pay for the erection of improvements, or for labor on the premises.

"The purpose of the exception of 'obligations contracted for the erection of improvements,' and for 'labor performed on the same,' so that a homestead is liable for such debt, though not for debts generally, is that those who have furnished the materials and performed the labor may have their remedy upon the property that have in part created and enhanced by the bestowal of their labor and property, and in the absence of any provision giving the lender of moneys, which have been expended upon the property, the benefit of the exception, the courts are powerless to extend it to them."

A strict construction must, therefore, be given to this exception, and we do not feel disposed to extend the terms "obligations contracted for the purchase of the property" to one who lends money to the vendee, even though the latter uses it in paying a third party who came within the exception, especially when the lender does not rely on the property for security, but takes a simple note therefor and looks to the indorser on such note for payment. We freely admit that courts of the highest respectability hold a different doctrine, though we find none in which the facts are on all-fours with this case, yet there are many that hold to the construction of similar constitutional provisions which we place upon ours, and there is ample justification in following our own decision: Brodie v. Batchelor, 75 N. C. 51; Calmes v. McCraken, 8 Rich. (S. C.) 87; Gray v. Baird, 4 Lea, 212; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Nottes' Appeal, 45 Pa. St. 361; Lear v. Heffner, 28 La. Ann. 829. As to so much, therefore, of said lot as constituted a homestead, there was no ground upon which the creditor could charge the property, and hence

there [579] was no equity for setting aside the conveyances as fraudulent.

Conceding the lot to have been in an incorporated town, and that it be larger than one-half acre in area, did appellees have the standing in equity to set aside the deeds as to this excess? They seek to found this equity upon a "confession of judgment," an execution upon such judgment and an inability on the part of the sheriff to realize on this execution. It appears that on the ninth day of February, A. D. 1898, the following order or writ was issued by the clerk of Lee county:

"The State of Florida, Greeting:

"You are hereby commanded to summon N. L. Langford and T. E. Langford, if they be found in your county, to appear before the judge of our Circuit Court, for the Sixth Judicial Circuit for the State of Florida, at the court house in Fort Myers on the first Monday in March, next, at a court to be held on that day, in and for the county of Lee, then and there to answer Irvin Locklar in action of assumpsit—damages $1100.00. And have then and there this writ.

"Witness, W. M. Hendry, Clerk of our Court, and the seal of the said court, at the court house at Fort Myers aforesaid, this 9th day of February, A. D. 1898.

"(Seal) W. M. HENDRY,
"Clerk.

"JAS. L. HARN,
"Attorney for Plaintiff."

The above does not appear to be addressed to any officer or person, nor does it appear to have ever come into the hands of the sheriff, much less to have been served by him. The record further shows that prior to the return day mentioned in the above order or writ, a paper writing was filed in the said clerk's office on the twelfth day of February, A. D. 1898, as follows:

[580] "In the Circuit Court, Sixth Judicial Circuit of Florida, in and for Lee County.

"Irvin Locklar
vs.
N. L. Langford and T. E. Langford.

"Assumpsit.
"Damages $1100.00.
"Confession of Judgment.

"We, the undersigned named defendants in above entitled cause, have hereby for ourselves privately and singly con-

fessed judgment before the clerk of the Circuit Court, in and for Lee county, Florida, for ten hundred and fifty-six and 95-100 dollars, damages due Irvin Locklar, and the said clerk of the Circuit Court is hereby authorized to enter judgment against us jointly in favor of Irvin Locklar for said sum and costs.

"(Signed) N. L. LANGFORD.
"T. E. LANGFORD."

And thereupon the clerk on the same day entered in his record-book the following: "And now on this 12th day of February, A. D. 1898, came the defendants, N. L. Langford and T. E. Langford, and file their written confession of judgment in favor of the plaintiff, Irvin Locklar, for the sum of ten hundred and fifty-six and 95-100 dollars. Therefore it is considered by the court that the plaintiff, the said Irvin Locklar do have and recover of and from the defendants, the said N. L. Langford and T. E. Langford, the sum of ten hundred and fifty-six and 95-100 dollars, as his cost in this behalf sustained and that plaintiff do have execution therefor.

"(Signed) W. M. HENDRY, Clk. Ct. Ct.,
"By J. E. FOXWORTHY, D. C."

No declaration appears to have been filed nor does the plaintiff appear to have taken any part in the proceedings, unless and except the inference be indulged that he applied for summons. The reasoning of this court in Epstein v. Ferst, 35 Fla. 498, 513, 17 South. 414, is most persuasive, if not conclusive, of the point. "Can a clerk of the circuit court who is purely a ministerial officer with [581] only statutory power enter a valid judgment in a proceeding of this kind? Admitting such a paper to be a confession of judgment, had the clerk the authority to enter a judgment upon such a confession made without service of process, when no suit was pending, and without any appearance by the defendant or any proof that he executed such a confession? Clearly there is no statutory authority for such action in this state."

We think the principle of the case referred to rules this, and that the judgment entered by the clerk under the circumstances of this case, though differing in some respects from the circumstances of the other, is void, and being void cannot support a bill to set aside a fraudulent conveyance.

The decree of the circuit court is reversed with directions to dismiss the bill.

Liens for the Purchase Money of Homesteads are discussed in the monographic note to Brown v. Ennis, 86 Am. St. Rep. 174-182.

DICKERSON v. CAMPBELL.

[47 Fla. 147, 35 South. 986.]

JUDGMENTS—Payment.—If a judgment debtor furnishes money to a third person to buy up the judgment, and such third person thus buys it at less than its face value, the creditor not knowing the facts, this amounts to a part payment only of the judgment. (p. 117.)

JUDGMENTS—Plea of Payment.—A plea to a scire facias to revive a judgment, alleging that a third person, as agent for the judgment debtor, purchased with money furnished by the latter, the judgment for less than its face value is not a good plea in bar, but amounts at most to a plea of payment pro tanto. (p. 117.)

L. G. Starbuck, for the plaintiff in error.

[148] COCKRELL, J. To a scire facias to revive a joint judgment for eight hundred and thirty dollars and thirty-four cents obtained by the receiver of the First National Bank of Orlando against the defendants in error and assigned to the plaintiff in scire facias, Isaac M. Lanier pleaded that the said judgment had been assigned under seal to one John M. Lee for the sum of two hundred and eleven dollars and sixty-five cents, and that said Lee's assignment was recorded in Osceola county, and since the beginning of the scire facias proceedings the judgment had been marked satisfied of record in Orange county by the said Lee; that at the time of said assignment Lanier was a judgment debtor to a large amount and "employed and appointed said Lee as his agent to negotiate for the purchase and assignment in his name, but as agent of said defendant, of all said judgments; that thereupon said Lee purchased all of said judgments, including judgment claimed by plaintiff in this case, with money furnished by the defendant and as his agent; that at the time of the assignment of said judgment to the plaintiff Dickerson, the bank or its receiver had no title therein, having previously sold the same to defendant's agent Lee; that Dickerson had no title to said judgment for the reason that at [149] the time of selling the same to said plaintiff, the First National Bank by its receiver expressly stated that he did not make any warranty to the title to said judgment, but only sold his right, title and interest; wherefore he denies that said Dickerson was entitled to the issuing of execution, and prays to be dismissed with his costs." A demurrer to said plea was overruled and the peti-

tion dismissed at plaintiff's costs, whereupon he prosecutes this writ of error.

The debt here was liquidated, had passed into a judgment from which no appeal was taken nor contemplated at the time of the alleged assignment so far as herein appears. The agent of the judgment debtor, with money supplied by the latter, secured an assignment from the judgment creditor without knowledge of such agency, and for a sum far below the face value of the judgment. No new or other consideration sufficient in law is set up for the surrender of this large balance of the liquidated judgment debt, and the transaction must therefore be treated as a partial payment by the debtor on account of said judgment. This doctrine, while not actually decided by this court, has been recognized as the law in at least two cases: See Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 346, and Sanford v. Abrams, 24 Fla. 181, 2 South. 373, where exceptions to the rule were made because the original demands were unliquidated or some other consideration existed. A case very similar in its facts to the one before us is that of Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578. It was there decided that where a judgment debtor furnishes money to a third person to buy up the judgment, and he does so, the creditor not knowing the facts, it amounts to a part payment only and that part payment of a debt by a debtor does not satisfy the whole, even if so received by the creditor.

The plea should have been treated as a plea of payment pro tanto only: See 1 Cyc. 319, and cases cited.

This disposition of the case renders it unnecessary to consider the other questions sought to be raised here.

150 The judgment will be reversed and the cause remanded for further proceedings in accordance with law and this opinion.

Carter, P. J., and Maxwell, J., concur.

Taylor, C. J., and Shackleford and Hocker, JJ., concur in the opinion.

The Decision in the Principal Case is squarely supported by Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578. The general features of the law of accord and satisfaction are discussed at length in the monographic note to Harrison v. Henderson, 100 Am. St. Rep. 390-456.

HARTFORD FIRE INSURANCE COMPANY v. REDDING.

[47 Fla. 228, 37 South. 62.]

INSURANCE, FIRE—Attorney Fees—Constitutional Law.—A statute authorizing the recovery of a reasonable attorney's fee against insurance companies in suits upon policies issued by them is constitutional. (p. 121.)

STATUTES—Repeal.—If two statutes upon the same subject are no necessarily inconsistent with each other, the later does not repeal the earlier. (p. 122.)

PLEADING AND PRACTICE.—Leave to amend a pleading may be granted during a term of court without notice to the opposite party of application therefor even though the case has been submitted upon demurrer by brief. (p. 124.)

PLEADING AND PRACTICE.—If a declaration is permitted to be amended pending the hearing of a demurrer thereto, the defendant must be permitted to demur or plead to such amended declaration. (p. 124.)

INSURANCE, FIRE—Notice and Proof of Loss.—The requirements in a standard insurance policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to the right to sue, but failure to comply with such requirements within the time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect. Such failure merely postpones the day of payment, provided notice is given and proof of loss is made within such time as will enable the insured to bring his suit within the time limited by the policy. (p. 126.)

INSURANCE, FIRE—Proof of Loss as Notice of Loss.—If proofs of loss served upon an insurance company are sufficiently full to give it notice of the loss required to be given by the insurance policy, such proofs will be sufficient as notice of the loss. (p. 127.)

INSURANCE.—Proof of Loss signed and sworn to by the assured, stating that the fire occurred at a certain hour of a day named, that it originated in the roof or attic of the insured building, that the cause of its origin was to him unknown, that such fire did not originate by any act, design, or procurement on the part of the assured, or in consequence of any fraud or evil practice on his part, and that any other information required by the insurer would be furnished on request, substantially complies with a provision in the policy requiring the proof of loss to state the knowledge and belief of the insured as to the time and origin of the fire, especially when the insurer requests no further information from the insured. (p. 129.)

TRIAL PRACTICE.—Trial Courts have Power and a very wide discretion to permit parties to withdraw from written stipulations waiving jury trial and submitting the case upon an agreed statement of facts to the court. (p. 131.)

INSURANCE, FIRE—Additional Insurance—Waiver of Condition.—If, at the time that a policy of fire insurance is issued, other insurance exists on the same property, and that fact is known to the insurance agent, who communicates it to the insurance company, and the latter accepts the premium without denying the validity of the policy on account of such other insurance until after the loss, such

conduct on the part of the company constitutes a waiver of a provision in the policy requiring written consent for other insurance, and the company is liable for the loss though its consent for such other insurance was not indorsed on the policy. (pp. 134, 135.)

INSURANCE, FIRE—Additional Insurance.—If a fire insurance company accepts the premium for a policy with knowledge of additional insurance then existing, without requiring the insured to comply with a provision in the policy concerning additional insurance, the insurer thereby gives consent for additional insurance to the amount then in existence on the insured property, for the full period of its own policy. The mere substitution of one policy of additional insurance for another of the same amount is permissible under such consent. (p. 135.)

A. W. Cockrell & Son, for the plaintiff in error.

T. L. Clarke, for the defendants in error.

[230] CARTER, P. J. This writ of error is taken from a judgment in favor of defendants in error rendered by the circuit court of Jefferson county, in an action against plaintiff in error upon a fire insurance policy. The policy in form is substantially the same as that set forth in the statement of facts in the case of Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283, 35 South. 228, except as hereinafter stated. It is dated October 14, 1899, and purports to insure Ida H. Redding for the term of one year from October 15, 1899, "against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding fifteen hundred dollars" to the building therein specifically described. It contains [231] an indorsement: "The insurable value of the building herein described is fixed at three thousand dollars," purporting to have been made "to comply with the act of the legislature of the state of Florida regulating the issue of policies by fire insurance companies approved May 31, 1899."

The declaration as originally drawn alleges the making of the policy, the payment of the premium, and the ownership of the property by Ida H. Redding at the time the policy was issued, and at the time of the fire. It alleges that by the policy the defendant "did insure the plaintiff Ida H. Redding for the term of one year from the said fifteenth day of October, A. D. 1899, at noon, to the fifteenth day of October, A. D. 1900, at noon, against all loss or damage by fire except as therein provided to an amount not exceeding the sum of fifteen hundred dollars" on a certain building, describing it; that "in and by its said policy the said defendant, the Hartford Fire Insurance Company, did promise and agree to pay to the plaintiff, Ida H. Redding, all such loss or damage as

might occur to said building by fire during the period of such insurance aforesaid not exceeding the said sum of fifteen hundred dollars, sixty days after notice and proof of such loss or damage furnished to the said defendant company"; that "on the twenty-first day of August, A. D. 1900, and while the said policy of insurance was in full force and effect, the aforesaid building was totally and entirely lost and destroyed by fire, of which loss and destruction the said defendant had due notice," and that "the plaintiff, Ida H. Redding, has rendered to the said defendant company a particular account and proof of said loss more than sixty days prior to the commencement of this action, and has otherwise fully complied on her part with all the conditions of said contract of insurance." It further alleges that the cash value of the building was four thousand dollars at the time of the loss; that Ida H. Redding actually sustained loss to said amount; that the total insurance on the building was three thousand dollars, consisting of the policy in suit "and a like policy of insurance for the sum of fifteen hundred [232] dollars issued to the plaintiff Ida H. Redding on the said building by the Home Insurance Company of New York City, at its Monticello, Florida, agency, numbered 328, dated April 18, 1900, and expiring April 18, A. D. 1901, of all which the defendant had due notice and proof."

There are other allegations in the declaration which need not be noticed further than to say that attorneys' fees were claimed under the statute hereafter referred to. The policy was attached to and made a part of the declaration.

The defendant filed its motion to strike those allegations of the declaration claiming attorneys' fees upon the grounds: 1. There is no law authorizing such recovery; 2. There is no law which required defendant to pay attorneys' fees before suit brought and prosecuted; 3. There is no law authorizing plaintiff to demand such fees before suit brought and prosecuted, consequently there can be no failure to pay on which to predicate a demand and refusal. This motion was overruled, and the ruling is assigned as error.

The court at the trial instructed the jury to find for the plaintiff an additional sum as attorneys' fees to be fixed at such reasonable amount as was shown by the evidence. This instruction was excepted to and is also assigned as error.

The recovery of attorneys' fees in cases of this character is authorized by chapter 4173 of the act approved June 3,

1893. It is contended that the statute is unconstitutional, but this court held otherwise in Tillis v. Liverpool etc. Ins. Co., 46 Fla. 268, ante, p. 89, 35 South. 171, and we adhere to that decision. The second section of the statute provides that "the amount to be recovered for fees and compensation for attorneys and solicitors against life and fire insurance companies as provided in the foregoing section shall be ascertained and fixed by the court in chancery causes, or a jury in common-law actions, from testimony adduced for that purpose, and shall be included in the judgment [233] or decree rendered against such companies." This language shows very clearly that the legislature intended to authorize the plaintiff in actions upon life and fire insurance policies to recover and have included in one and the same judgment the amount due upon the policy and the attorneys' fees, and there is consequently no impropriety in claiming attorneys' fees by the declaration which seeks to recover upon the policy.

It is further contended that the statute was repealed by chapter 4677, approved May 31, 1899, entitled "An act to regulate contracts of insurance of buildings and structures in this state, to fix a measure of damage in case of loss, and to prescribe a rule of evidence therein," which reads as follows:

"Section 1. That from and after the passage of this act any individual, firm, corporation or association insuring any building or structure in this state against loss or damage by fire or lightning, shall cause such building or structure to be examined by an agent of the insurer and full description thereof to be made, and the insurable value thereof to be fixed by such agent and written in the policy; in the absence of any change increasing the risk without the consent of the insurers, in case of total loss the whole amount mentioned in the policy upon which the insurers receive a premium shall be paid, and in case of partial loss the full amount of the partial loss shall be paid, but in no case shall the insurer be required to pay more than the amount upon which a premium is paid.

"Sec. 2. In case of the total loss of the property insured the measure of damage shall be the amount upon which the insured paid a premium, and, in case of partial loss, the measure of damage shall be such part of the amount upon which premiums are paid as the damage sustained is part of the insurable value of the building or structure as fixed by the agent of the insurer, and the insurers shall be estopped

from denying that the property insured was worth at the time of insuring the amount of the insurable value as fixed by the agent.

234 "Sec. 3. Any person who solicits insurance and procures applications therefor shall be held to be the agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding.

"Sec. 4. That the defendant in any action brought upon a policy, or contract of insurance, hereafter made, or renewed, insuring any building or structure in this state, against loss or damage by fire or lightning, shall not be permitted to defend against such action, by setting up any claim, or provision of such policy, or contract of insurance, as avoiding the provisions, or any of them, of this act; and it shall be the duty of the court on motion of the plaintiff, or on its own motion, to strike out any plea setting up such defense."

A question very similar to the one here presented was considered in Florida East Coast Ry. Co. v. Hazel, 43 Fla. 263, 99 Am. St. Rep. 114, 31 South. 272, and it was held that the latter statute did not repeal the former. There is no necessary inconsistency between the two statutes we are now considering, and upon the authority of the decision in that case we hold that the act of 1893 was not repealed by the act of 1899. The motion to strike was properly denied. The instruction complained of is correct.

In this connection we will consider the contention made that the act of 1899 is unconstitutional. It is argued that properly construed the statute denies the right of the insurer to plead that the fire was caused by the criminal conduct of the insured; that the insured by fraud procured or induced the insurer to fix the insurable value at an excessive amount, and that the property depreciated in value between the date of the policy and the loss. The contention, as we understand it, is that the statute confines the insurer's defenses to four only, viz.: That the contract was never in fact executed; that the loss set up never in fact occurred; that the loss was not due to fire or lightning; that the property insured was not in fact a building or structure in the state of Florida.

235 The statute requires the insurer to fix the insurable value of the building and to specify such value in the policy, and the measure of damages in case of a total loss is fixed at the amount mentioned in the policy upon which a premium is paid. The statute does not undertake to deprive the in-

surer of any proper defense it may have to an action upon the policy except in respect to the measure of damages and the authority of certain agents. Its principal object and purpose is to fix the measure of damages in case of loss total or partial, and to this end it requires the insurer to ascertain the insurable value at the time of writing the policy, and to write it therein. Its provisions do affect the three-fourths value and arbitration clauses as well as other clauses contained in the policy, but there is nothing in its language that will justify us in holding that it deprives the insurer of the right to plead that the fire was caused by the criminal conduct of the assured, or that the insurable value was procured to be fixed by fraud on his part. Whether the statute properly construed deprives the insurer of the right to show that the property depreciated in value between the time the policy was issued and the loss, we do not find it necessary to determine in this case, as there is no claim that the property insured by this policy had so depreciated, but if the statute does deprive the insurer of that right, it will not be unconstitutional for that reason. In fixing the insurable value the insurer can consider depreciation as an element, and protect itself against ordinary depreciation in that way. Without further discussion of the question it is sufficient to say that the provisions of this statute are not contrary to the constitution of this state or of the United States: Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. ed. 552; Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73, 21 Sup. Ct. Rep. 535, 45 L. ed. 955. See, also, Farmers' etc. Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. Rep. 565, 47 L. ed. 821.

The defendant filed its demurrer to the original declaration, and the demurrer came on for hearing during a term [236] of the court. The order on demurrer recites that "this action having been submitted on brief of counsel for the respective parties on the demurrer of defendant to plaintiffs' declaration, and the plaintiffs having with leave of the court amended their said declaration by striking out the word 'otherwise' in line 20 from top of second page of said declaration, and by inserting after the word 'proof' in line 4 from top of third page of said declaration the words 'and made no objection to such additional insurance,' thereupon, upon consideration of the same, it is considered and ordered, that the said demurrer of the defendant to the complainant's declaration be, and the same is hereby, overruled, and the defendant is granted leave

until the first Monday in January, A. D. 1902, to plead over to said declaration." Several assignments of error are based upon this order which we will now discuss.

It is first insisted that the court erred in permitting the declaration to be amended without notice to the defendant. The rule requiring notice of applications to amend (Common Law Rule Number 12) has reference to amendments made in vacation, and not to those made in term. It is true that the demurrer in this case was submitted upon briefs, but it was heard and decided and the amendment was permitted in term. The mere fact that the parties chose to submit the demurrer upon briefs during the term did not deprive the court of the power to make any appropriate order in term without requiring special notice to be given, that it could have made had the demurrer been submitted orally or if the case had not been before the court upon demurrer at all. There was, therefore, no error in permitting the amendment of the declaration without requiring special notice of the application to amend.

It is also contended that the court erred in depriving defendant of the right to demur to the amended declaration, by requiring it to "plead over" and in applying the demurrer to the amended declaration without a request on its part to that effect. This court is of opinion that such [237] contention is correct. When the declaration was amended the defendant should have had an opportunity to plead to the amended declaration by filing a demurrer if it deemed the amended pleading bad, or by filing pleas if it chose to file pleas instead of a demurrer. But the defendant was entitled to have its demurrer applied to the amended declaration if it desired, and the court did in fact give it the benefit of the demurrer to the same extent as if application had been made to that effect. The court below gave it the same benefit of the demurrer as if it had been filed to the amended declaration, which the defendant knew at the time of filing its pleas, and with this knowledge it filed pleas, without offering to file a demurrer or asking leave to do so. It now asks that the order overruling the demurrer be reviewed and reversed because as it insists the declaration was bad, and therefore the demurrer should have been sustained, instead of overruled. The grounds of demurrer are broad enough to include every objection urged to the declaration, as amended, and if the declaration is valid as against these objections, the judgment

should not be reversed for this technical error in a mere matter of practice which did not and could not injure the defendant.

The principal questions sought to be presented by the objections to the declaration as amended depend upon the correct interpretation of certain provisions in the policy relating to notice of loss and proofs of loss, and upon the effect to be given other provisions requiring defendant's consent for other insurance to be evidenced by indorsements upon or additions to the policy. These provisions are substantially the same as those contained in the policy in the case of Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283, 35 South. 228, as already stated except that the policy in that case provides that "if fire occur the insured shall give immediate notice of any loss," etc., while the policy in the present case omits the word "immediate." Probably the omission of this word is a clerical error in copying the policy in the transcript, but the omitted word is not regarded [238] as material to this case, as without it the proper construction of the provision as it stands would probably require the notice to be given within a reasonable time. So construing it, what effect will the omission to give the notice of loss and to furnish proofs of loss have upon the rights of the insured? In the case referred to above it was contended that the failure of the assured to make proofs of loss required by the policy within the time thereby provided wrought an absolute forfeiture thereof and released the insurer from all liability thereon. The court said: "Unfortunately for this contention it is founded upon a false premise. The provision of the policy sued upon herein requiring the assured to make proofs of loss within sixty days after the fire does not provide that such policy shall become void, forfeited or annulled upon a failure to furnish such proofs of loss within the prescribed time, and such is not the legal effect of said contract between the parties. Taken in connection with another provision of said contract of insurance the only effect of a failure to furnish the prescribed proofs of loss within the required time, when such failure has not been excused or waived, is that it postpones the date when the amount of the loss becomes due and payable, and consequently postpones the time within which suit may be brought thereon, another part of the policy providing that the amount due upon the policy shall be payable sixty days after the satisfactory proofs of loss have been received by the company."

The effect of a failure to give the notice of loss immediately or within a definite time was not considered in that case, but we think it is governed by the same principles. The provision requiring notice of loss is of the same nature as that requiring proofs of loss, the two are used in the same connection in the policy, and while each constitutes a condition to the right to sue, and must be performed if not waived before suit can be instituted, it is nowhere provided that a failure to perform them within the time specified shall release the company from liability or render the policy void. There are many provisions in [239] the policy requiring the performance by the insured of stipulations relating to the insurance after, as well as before the loss, the nonperformance of which it is expressly stated will render the policy void or release the company from liability; but no such effect is stipulated for failure to give the notice and make the proofs within the required time. Many authorities can be found which require the notice of loss to be made within the time specified, but the same authorities also hold the same rule with respect to proofs of loss. We think the same principles which uphold the rule announced in Indian River State Bank v. Hartford Fire Ins. Co., 46 Fla. 283, 35 South. 228, require a like holding with respect to the notice of loss. In Ermentrout v. Girard Fire etc. Ins. Co., 63 Minn. 305, 56 Am. St. Rep. 481, 65 N. W. 635, 30 L. R. A. 346, and other Minnesota cases it was held that the failure to comply with the requirement to give immediate notice was a condition precedent to the company's liability, but in Mason v. St. Paul Fire etc. Ins. Co., 82 Minn. 336, 83 Am. St. Rep. 433, 85 N. W. 13, the previous cases are referred to and the doctrine announced that the result stated does not apply to the Minnesota standard policy because that policy does not provide that a failure to give notice or make the proofs within the time stated shall invalidate the policy or work a forfeiture of the rights of the insured, and that the failure to comply with the requirements within the time stated will simply postpone the day of payment: See, also, Peninsular Land Transp. etc. Co. v. Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237; Coventry Mutual Livestock Ins. Assn. v. Evans, 102 Pa. St. 281; Hurt v. Employers' Liability Assur. Corp., Limited, of London, England, 122 Fed. 828.

Having ascertained the proper construction of the provisions of the policy respecting notice and proofs of loss, we will consider the objections urged to the amended declaration, with

respect to these matters. The declaration attempts to set out the legal effect of the policy, and it also [240] makes the policy itself a part of its averments. It is contended that there is a variance between the alleged legal effect, and the instrument itself properly construed. The variance, it is thought, arises upon a comparison of the language of the declaration that the defendant promised to pay "sixty days after notice and proof of such loss furnished to the said defendant," and the stipulations of the policy which it is claimed when properly construed require it to pay sixty days after the notice of loss and proofs of loss rendered in accordance with the terms of the policy, i. e., notice of loss given immediately or within a reasonable time and proofs of loss rendered within sixty days after the fire. As we have already shown, this is not the proper construction of the contract. The suit was begun February 19, 1901. The fire is alleged to have occurred August 21, 1900. The declaration alleges that proofs of loss were rendered more than sixty days prior to the commencement of the suit, which would show that they were rendered prior to December 19, 1900, or within four months of the fire. Even if no other notice of the loss was given except the proofs of loss so alleged to have been furnished, the declaration shows that the proofs were of such a nature as to give "notice of the loss," and as these proofs were furnished long before the contract limitation upon the suit expired, it was sufficient to authorize recovery in this case. The alleged variance between the allegations of the declaration and the terms of the policy made a part thereof does not exist if the construction we have placed upon the policy is correct.

Another objection to the declaration is that it appears therefrom that after the issuance of the policy sued on another policy was obtained from the Home Insurance Company for a like amount; that no permission to take such additional policy was indorsed in writing upon the Hartford policy, as appears from an inspection of the latter made a part of the declaration, and that consequently the policy became void under that clause which reads: "This entire policy unless otherwise provided by agreement indorsed [241] hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not on property covered in whole or in part by this policy." The declaration as amended alleges that the additional policy was obtained in April, and that defendant had due

notice and proof of the additional insurance and made no objection thereto. If the defendant had notice of the additional insurance and made no objection thereto it must be held to have given its consent thereto. By its failure to object after notice of the fact, the insured was led to rely upon the validity of its policy, and it cannot now after a loss, when it is too late for the insured to obtain other insurance, be permitted to repudiate its liability upon the ground stated. This allegation shows a waiver of the provisions of the policy requiring that the permission for such additional insurance be indorsed on or added thereto, a proposition which we discuss under another assignment of error, and, therefore, the objection to the declaration now being considered is not tenable.

The fifth ground of the demurrer complains that the declaration does not aver performance of conditions precedent generally, nor particularly the performance of each and every condition precedent, nor set up excuse for non-performance. We have shown that the amended declaration does allege the issuance of the policy, the payment of the premium and the loss, and that it sufficiently alleges performance of the provisions requiring notice and proof of loss, and waiver of the requirement that permission for other insurance must be indorsed on the policy, if that can properly be considered a condition precedent. In addition to these special allegations, the declaration alleges generally that plaintiff "has fully complied on her part with all the conditions of said contract of insurance." If there are other conditions precedent not embraced in these averments they do not now occur to us, and none were pointed out either in the oral argument or briefs.

[242] The defendant after its demurrer was overruled filed two pleas in substance as follows: 1. That the policy sued on contains a provision that "if fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, and defendant avers that the notice so required was not given in writing or otherwise"; 2. That the policy sued on provides "that the insured within sixty days after the fire, unless such time is extended in writing by the insurance company shall render a statement to the insurance company signed and sworn to by the insured stating the knowledge and belief of the insured as to the time and origin of the fire, and defendant avers that the time was not extended and the statement so required was not rendered."

After plaintiff's demurrer to these pleas was overruled they filed their replication thereto, alleging substantially that on December 17, 1900, they sent by mail to defendant a statement in writing signed and sworn to by Ida H. Redding, the insured, stating therein, among other things, "that the fire by which the insured building was destroyed occurred about 11 P. M., August 21, 1900, originating in the roof or attic of said building, but how said fire originated or the cause thereof was to said insured entirely unknown; that said fire did not originate by any act, design or procurement on the part of said insured, or in consequence of any fraud or evil practice done or suffered by the insured, and that any other information required by defendant would be furnished on call"; that said written statement so signed and sworn to by insured was received by defendant, and by it retained until the twenty-fourth day of December, A. D. 1900, and then returned to plaintiffs with the objections only that the same had not been furnished within sixty days after the fire occurred, and no other or further information was called for by the defendant. The defendant demurred to this replication, and the order overruling it is assigned as error.

[243] It is beyond question that the written proofs of loss which the replication alleges were delivered to defendant in December after the fire in August were a sufficient "notice of loss" (Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394, 31 N. E. 231; Purcell v. St. Paul Fire etc. Ins. Co., 5 N. Dak. 100, 64 N. W. 943), and, as we have already seen, the failure to give this notice immediately did not invalidate the policy, but merely postponed plaintiff's right to sue. The replication was, therefore, a complete answer to the first plea.

The objection to the replication as applied to the second plea is that the insured did not state in the proofs of loss her belief as to the origin of the fire. It does not appear that the insured had any belief as to the origin of the fire which she could state. She does state the time of the fire, that it originated in the attic, but how it originated, or the cause thereof, she swears was entirely unknown to her. She then proceeds to state her knowledge that it did not originate through her procurement, or in consequence of any fraud or evil practice done or suffered by her. There is no intimation anywhere that she had any belief upon the subject, and it affirmatively appears that she had no knowledge of

any fact upon which to base a belief. We think the statement rendered substantially complies with the requirements of the policy: McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Howard Ins. Co. v. Hocking, 115 Pa. St. 415, 8 Atl. 592; 13 Am. & Eng. Ency. of Law, p. 336. An offer to furnish other information, if desired, was made, and as the company did not avail itself of that offer by asking other information according to the allegations of the replication, it seems evident that it did not regard the absence of the statement of belief as material at that time.

It is contended that the replication is a departure from the declaration, but we think otherwise. The declaration alleges performance with respect to the notice of loss and proofs of loss; the pleas deny the allegations of performance, [244] and the replication merely reiterates performance setting forth the facts at length. The replication does not set up waiver, but performance in accordance with the interpretation we put upon the provisions of the policy.

Nearly a year after the pleas above considered were filed, the defendant filed its third plea, alleging that "it is provided in the contract sued on 'this entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy,' and defendant avers that after said policy was issued, to wit, on the eighteenth day of April, A. D. 1900, the insured, Ida H. Redding, procured another contract of insurance on the property covered by the policy sued on, issued by the Home Insurance Company, which other insurance was not provided for by agreement indorsed on or added to said policy sued on." The plaintiffs filed their replication to this plea, and defendant its demurrer to the replication, and thereupon by agreement of parties a jury was waived and the cause was submitted to the judge upon an agreed statement of facts, to be decided in vacation. This agreement was made November 20, 1902. On December 2d following, plaintiffs moved the court for leave to withdraw their replication to the third plea, and for leave to withdraw from the written submission and stipulation entered into November 20, 1902, basing the latter application upon the fact that other material testimony on behalf of plaintiffs had been discovered since the making of the agreement for submission, and because the pleadings, evi-

dence and stipulations then on file did not fully and fairly present to the court the facts as they really existed. At the hearing it was shown that within five days after the written agreement was entered into plaintiffs notified defendant that they had discovered the existence of material facts not embraced in the written agreement, and requested that the additional matter be embraced in the agreed statement of [245] facts. Counsel declined to accede to the request, and thereupon the motion to withdraw from the submission was made. The motion was resisted principally because the additional matters could have been known to plaintiffs' counsel before the submission if he had exercised due diligence to ascertain them. The court granted the motion to withdraw plaintiffs' replication to the third plea, and also permitted plaintiffs to withdraw from the written submission, and to file new replications to the third plea, and these rulings are assigned as error.

Under our very liberal statute of amendments the court had ample power to permit plaintiffs to withdraw their replication and to file others. The matter rested very largely in the discretion of the court and no abuse of discretion is shown.

Nor do we perceive any impropriety in the ruling permitting plaintiffs to withdraw from the written stipulation. As defendant would not consent to amend the agreed statement of facts so as to embrace the additional matters which plaintiffs desired to incorporate therein, and as the court had not rendered its decision in pursuance of the stipulation, it was proper to permit plaintiff to withdraw from the stipulation in order that the case might take its regular course before a jury, and the parties thereby have an opportunity to present all pertinent facts. The defendant was not deprived of any substantial right by the order, it had not been misled to its disadvantage nor put to any trouble or inconvenience between the date of the submission and the plaintiffs' motion to withdraw. The mere fact that plaintiffs might have discovered the new matter by the exercise of proper diligence before they agreed to the submission does not, as a matter of law, deprive them of the privilege of withdrawing from the submission, for the case had not been decided by the court, and, therefore, the strict rule of diligence applicable to new trials for newly discovered evidence does not apply. The court had power to [246] make the order, the matter rested in its discre-

tion, and no abuse of discretion is shown: 20 Ency. of Pl. & Pr. 670.

The replication to the third plea filed by plaintiffs in pursuance of leave granted alleges, among other things, that on October 15, 1889, plaintiff, Ida H. Redding, applied to the local agent of the defendant, who was also the local agent of the Aetna Fire Insurance Company, for insurance on the building; that the agent had authority on behalf of the companies to examine the building, fix its insurable value, write, countersign and issue policies thereon, and to collect and receive the premium; that he examined the building, fixed the insurable value at three thousand dollars, issued to plaintiff the policy sued on and a like policy in the Aetna Insurance Company, and thereupon, in discharge of his duty, gave defendant immediate notice in writing of the fifteen hundred dollars additional insurance; that defendant, with full knowledge and notice of the existence of the additional insurance, consented to and accepted the risk with the purpose and intent that same should be concurrent with additional insurance of fifteen hundred dollars, and not avoided thereby, and with purpose and intent to waive and forego any and all benefit of said provisions and conditions; that in faith thereof and with the sole purpose of procuring such insurance to be concurrent with additional insurance on said building to the amount of fifteen hundred dollars, and not otherwise, the plaintiff paid and defendant received the premium amounting to the sum of sixty dollars; that afterward, on April 18, 1900, the Aetna Insurance Company canceled its policy, and in lieu and place thereof the same agent who was also the agent of the Home Insurance Company wrote, countersigned, issued and delivered to plaintiff, Ida H. Redding, the policy of the last-named company for fifteen hundred dollars, mentioned in defendant's plea; that afterward on December 24, 1900, plaintiff, Ida H. Redding, in her sworn proofs of loss then furnished defendant notified and fully advised it of the policy for fifteen hundred dollars, in the Home Insurance Company, and the defendant then and there made no claim [247] that said additional insurance was not provided for by agreement indorsed on its policy, and set up no want of knowledge or consent on its part to the existence of said additional insurance, and claimed no forfeiture of its said policy by reason of said additional insurance or by reason of any failure to comply with the provisions and conditions set up in its said

plea, and that defendant has made no tender of or offer to return the premium of sixty dollars so as aforesaid paid by plaintiffs to defendant for its said policy, but still retains the same. The defendant demurred to this replication, but the court overruled it, and this ruling is assigned as error.

It is contended that the replication is a departure from the declaration. The declaration alleges that defendant had notice of the additional insurance and facts showing a waiver with respect to the provisions relating to indorsement on the policy of permission for such additional insurance. The plea does not traverse this allegation of waiver nor deny that defendant had notice, but asserts merely that the permission for other insurance was not indorsed upon the policy. The replication reiterates waiver and alleges specifically the facts which it is claimed constitute such waiver. The plea is not directly responsive to the material allegations of the declaration, and for that reason might, perhaps, have been held bad upon demurrer, but the replication constitutes no departure from the declaration as both allege waiver.

It is also contended that plaintiffs, having already filed one replication taking issue upon this plea, could not be permitted to file another, the argument being that while the statute (Rev. Stats. 1902, sec. 1063) permits more than one plea to be filed to the declaration, the same indulgence was not, and could not with safety, be extended to replications. Section 1059 of the Revised Statutes of 1892 provides that a plaintiff "may file as many replications or subsequent pleadings to any pleading of the defendant as he may desire," and this language [248] fully answers defendant's contention without further comment.

The principal contention, however, relates to the sufficiency of the allegations of the plea to show a waiver of the provision of the policy requiring the company's permission for additional insurance to be indorsed on or added thereto, and it is strenuously insisted that the decision of the supreme court of the United States in Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. ed. 213, conclusively decides that question in favor of defendant. The provisions of the policy construed in that case, so far as the question now being considered is concerned, are very similar to the provisions invoked by defendant contained in the policy sued on in this case. In that case the jury found that when the policy was issued, other insurance upon the property was

in existence; that the agent who issued the policy was recording agent of the company having authority to countersign and issue policies, to accept fire insurance risks in its behalf and to collect and receive premiums therefor; that the agent knew of the other insurance when he issued the policy, and that no consent for such additional insurance was indorsed on the policy. It further appeared that knowledge of the additional insurance was never communicated to the company until proofs of loss were made, and that the company immediately, upon receipt of such information, denied any liability on that ground and tendered the insured the premium paid by him. The court held that the agent's authority in matters of waiver of condition was limited to the method designated—that is, by indorsements on or written additions to the policy—and that as knowledge of the additional insurance was never acquired by the company until the loss occurred, when it immediately denied liability because of such additional insurance, and tendered the insured the premium, the company was not liable for the loss. This decision is directly in conflict with the opinions of many other courts and text-writers, and several courts since it [249] was rendered have refused to follow it: Thompson v. Traders' Ins. Co. of Chicago, 169 Mo. 12, 92 Am. St. Rep. 641, 68 S. W. 889, 58 L. R. A. 436; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339. See, also, Clement on Fire Insurance as a Valid Contract, p. 413.

We do not think the decision in that case, even if it is correct, controls the present one. Here we have, not simply the knowledge of the local agent that the additional insurance existed, but the knowledge of the company itself, which with such knowledge accepted the premium, and thereby gave its consent to the additional insurance. Knowing that the additional insurance existed and that its consent thereto was required by the terms of its policy to be indorsed thereon in order to render its contract valid, it was its duty to so indorse it or decline to accept the premium which it knew was being paid for a supposed valid policy. The insured had no authority to indorse such consent on the policy, and if the company intended to act fairly and honestly and not to perpetrate a deliberate fraud by accepting the consideration for its contract known to be void, good faith required it either to indorse the policy, or to waive the provision requiring such indorsement. We cannot suppose that a fraud was intended by the

company, and the only reasonable conclusion is that by accepting and retaining the premium with knowledge of the additional insurance it intended to waive the provisions referred to: Clement on Fire Insurance as a Valid Contract, pp. 418, 428. In Tillis v. Liverpool etc. Ins. Co., 46 Fla. 268, ante, p 89, 35 South. 117, we held that provisions of this nature might be waived, and the decision of the supreme court of the United States above referred to admits that this is so, provided the waiver is made by an officer having authority: See, also, to the same ecect, Aetna Life Ins. Co. v. Frierson, 114 Fed. 56, 51 C. C A. 424; Gwaltney v. Provident Sav. Life Assur. Soc., 132 N. C. 925, 44 S. E. 659; note to Wheaton v. North British etc Ins. Co., 9 Am. St. Rep. 235; Kerr on Insurance, p. 238. It is insisted, however, that the replication does not allege that the company knew that the [250] agent had failed to indorse its consent to the additional insurance on the policy when it accepted the premium. We do not regard such knowledge material to the question in hand. Knowledge of the additional insurance was the important thing, and with such knowledge the company's plain duty required it to see that the proper indorsement was made on the policy if it elected to retain the premium, and making no effort to perform that duty it must be held to have waived the matter of indorsement. This is the reasonable view, and the only one consistent with fair dealing.

We have thus far treated the matter as if the policy mentioned in the plea constituted the additional insurance which existed at the time the policy in suit was issued, but the fact is not precisely that. The insurance in force when the policy was issued consisted of a policy in the Aetna which was afterward canceled and another issued in lieu thereof in the Home. The latter policy, however, was merely a substitute for the former, being issued for the same amount. We are of opinion that this substitution of one policy for the other does not constitute a breach of the condition against other insurance, for the defendant, by accepting the premium for the policy in suit with knowledge of the additional insurance then existing, thereby gave its consent for additional insurance to the amount then in existence for the full period of its own policy. The mere substitution of one policy for another of the same amount was permissible under that consent: See Stage v. Home Ins. Co., 76 App. Div. 509, 78 N. Y. Supp. 555. Evidently the defendant did not regard the Home policy as hav-

ing been taken without its consent, for according to the allegations of the replication it made no objection to the proofs of loss on that account, and in its plea there is no denial that it had due notice of the additional insurance.

Several objections to testimony offered at the trial were interposed by the defendant which we will now consider. The proofs of loss were objected to on several grounds which [251] have been disposed of in what has been said in considering other assignments of error.

For the purpose of proving defendant's knowledge of the additional insurance, the daily report sent by its agent to the defendant on the day the policy in suit was issued was introduced in evidence by the plaintiffs, over certain objections interposed by defendant. This daily report was made up in pursuance of instructions to the agent to "give full copy of the policy" as well as other information, and it gives the written portions of the policy issued with the indorsement slips. In answer to questions propounded, the agent stated that the company had no other policies in or on the same building, but in another place he stated there was fifteen hundred dollars additional insurance on the property, and, being required to "name" companies, amounts and rates, he stated "Hartford," which was evidently a clerical error in view of his other statement already referred to. It is contended that this report did not advise the company that there was any additional insurance upon the property, and even if it did, the additional insurance was stated to exist in the same company, which was not the truth. We think the report clearly advises the company that there was fifteen hundred dollars, additional insurance. Besides the plea does not deny the fact of knowledge. The conflicting statements in the daily report about its being in the same company put the defendant upon notice that some mistake had been made as to this matter, and it could easily ascertain by reference to its own records which statement was true. There was no uncertainty as to the fact that other insurance existed, which was the important matter for the company to know. The name of the company carrying the additional insurance was not required by the policy to be stated in the written consent. There was no error in admitting in evidence the daily report.

The court gave the general charge to find for the plaintiffs, to which an exception was taken. The defendant introduced no testimony, and without encumbering this opin-

ion [252] with a further statement of the facts, we think it sufficient to say there was no error in giving the charge.

The judgment is affirmed.

Shackleford and Whitfield, JJ., concur.

Taylor, C. J., and Hocker, J., concur in the opinion.

Cockrell, J., being disqualified, took no part in the decision of this case.

A Statute Authorizing the Taxation of Attorney's Fees as costs when a judgment is rendered against an insurance company in an action on a policy covering real estate is constitutional: Farmers' etc. Ins. Co. v. Dabney, 62 Neb. 213, 97 Am. St. Rep. 624, and note.

A Provision in a Policy of Insurance that procuring additional insurance on the property will avoid the policy, unless the written consent of the insurer is indorsed thereon, is waived by the failure of the insurer to cancel the policy or indorse its consent thereon within a reasonable time after notice to it of the additional insurance before a loss: Swedish-American Ins. Co. v. Knutson, 67 Kan. 71, 100 Am. St. Rep. 382; Lutz v. Anchor Fire Ins. Co., 120 Iowa, 136, 98 Am. St. Rep. 349.

If a Policy of Insurance Provides that Notice and proof of loss must be furnished within a certain time after a loss has occurred, but does not impose a forfeiture for failure to furnish them within the time specified, nor impose a forfeiture for failure to comply with other conditions of the contract, the insured may maintain an action, though he does not furnish notice and proof of loss within the prescribed time, provided he does furnish them at some time prior to commencing his action, although the policy provides that no action can be maintained until after full compliance with all its requirements: Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 151, 105 Am. St. Rep. 916.

OTTENSOSER v. SCOTT.

[47 Fla. 276, 37 South. 161.]

BUILDING AND LOAN ASSOCIATIONS—Insolvency—Earned Premiums.—The receiver of an insolvent building and loan association is not entitled to charge a borrowing member with a so-called "earned premium," when such premium is in the form of a deduction for the sum loaned, and the member is not in arrears for dues or assessments nor chargeable with the fact that the association is insolvent. (p. 139.)

BUILDING AND LOAN ASSOCIATIONS—Insolvency—Credit Due to Members.—In settling the affairs of an insolvent building and loan association, borrowing members are not entitled to credit for the full face or book value of their stock, but only for a pro rata thereof, such as actual conditions may warrant, based on the net assets in the hands of the receiver. (p. 139.)

BUILDING AND LOAN ASSOCIATIONS—Insolvency—Attorney Fees.—In winding up the affairs of an insolvent building and loan association, attorney fees are properly allowed against borrowing members when their mortgages provide therefor. (p. 140.)

BUILDING AND LOAN ASSOCIATIONS—Insolvency—Res Judicata.—Borrowing Members of an insolvent building and loan association have a right to contest a scheme of settlement agreed upon by a majority of the stockholders, and adopted by the court in a bill filed by certain other stockholders, "on behalf of themselves and all others who may be similarly situated and having like interests who may join them as complainants" against the association, if none of such borrowing members are in the same class with such complainants, and the facts that such borrowing members filed their protest against such scheme and were represente by counsel who appeared, do not constitute a res judicata, if they did not intervene, nor place themselves in a position to control the case on appeal, and no action was taken by the court upon such protest. (pp. 141, 142.)

R. McConathy and W. K. Zewadski, for the appellants.

R. A. Burford, for the appellee.

277 COCKRELL, J. The principle contention in this case is the right of an insolvent building and loan association to charge a borrowing stockholder with a proportionate part of the discount bid for the priority of loan, the so-called "earned premium." In this case the Ottensosers had bid for this priority of loan a discount of twenty-nine and four-fifths per cent, and had paid promptly when due, each month for eighty-five months, and until the association was dissolved by the appointment of a receiver, the monthly installments of interest on the amount borrowed and of assessments on the stock bought; and upon a bill filed by the receiver of the association to enforce the mortgage lien given as security for the transaction, they were charged with the amount actually received, with eight per cent interest, the legal rate of interest in this state, from the time the said amount was received, and were further charged with eighty-five per cent of the discount so bid, on the theory that the scheme upon which the bid was made having partially failed, the bidder was equitably entitled to a reduction only of the bid, in proportion to the degree of the failure, and as the scheme was estimated to work out in one hundred months, the bidder had the advantage of the scheme for eighty-five of these months, and should, therefore, be charged in that ratio. Such method of charging borrowing stockholders of insolvent building and loan associations is not without respectable authority, nor is it unsupported by weighty reasons. It was announced by Judge Grosscup in Towle v. American Bldg. etc. Soc., 61 Fed. 446,

and has been frequently applied in the federal courts. We are of the opinion, however, that the weight of authority, as [278] well as the sounder reason, is to the contrary. The premium bid, in the instant case, is in the form of a deduction from the sum to be loaned, and is founded upon the sole consideration that the scheme will work out without interruption; and if the existence of the association is prematurely interrupted through no fault of the borrowing member, the consideration for the bid entirely fails and there is no equity for its apportionment. According to the agreed facts before us, the failure of the association was caused by circumstances over which neither the association nor its members had control, viz., the depreciation of its assets by the freeze of 1895, and the collapse of two Ocala banks. The decree is to be modified, therefore, by striking off from the accounting the charges against the defendants for "earned premiums." The cases sustaining this view are numerous and we shall cite only a few: Hale v. Phillips, 68 Ark. 382, 59 S. W. 35; Curtis v. Granite State Provident Assn., 69 Conn. 6, 36 Atl. 1023; Marion Trust Co. v. Trustees of Edwards Lodge, 153 Ind. 96, 54 N. E. 444; Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 517; Knutson v. Northwestern Loan etc. Assn., 67 Minn. 201, 64 Am. St. Rep. 410, 69 N. W. 889; Anselme v. American Savings etc. Assn., 63 Neb. 525, 88 N. W. 665; Weir v. Granite State Provident Assn., 56 N. J. Eq. 234, 38 Atl. 643; Strohen v. Franklin Sav. Fund etc. Assn., 115 Pa. St. 273, 8 Atl. 843; Rogers v. Hargo, 92 Tenn. 35, 20 S. W. 430; Young v. Improvement Loan etc. Assn., 48 W. Va. 512, 38 S. E. 670. See, also, Endlich on Building Associations, 2d ed., sec. 531.

The defendants are not entitled to credit upon their indebtedness the full face or book value of the stock held by them in the several series issued, but only for such pro rata amount as the actual conditions may warrant based upon the net assets in the hands of the receiver. As stockholders in the association, they are not to be preferred as such over their fellow-stockholders by reason of the fact [279] that they are also borrowers from the association: See authorities cited above. No question of usury is here involved.

It is further contended that there was error in allowing counsel fees, and in support thereof Park v. Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905, and Union Trust Co. v. Shilling, 30 Ind. App. 543, 66 N. E. 699, are cited. We think those

cases may be distinguished from the present case. In both of them the courts refused to allow attorney's fees, conditioned upon the failure of the borrowers to fulfil the conditions of their "bonds," on the theory that it was the act of the law precipitating the maturity of the debt on the insolvency of the association that caused the suit, and not the failure of the debtor to comply with his bond. In the instant case the mortgage, not the bond, provides for the fee, and in it we find the following: "And the said Fannie and L. Ottensoser promise and agree to pay a reasonable sum of money for solicitor's fees that may be incurred by the Ocala Building and Loan Association, in the event that foreclosure of this mortgage become necessary." The foreclosure became necessary by reason of the failure of the defendants to pay the sum due upon the equitable accounting indicated above, and a reasonable fee should be awarded, the amount thereof to be hereafter determined.

The appellee insists that the Ottensosers should not be heard to contest the scheme of settlement decreed in the Clyatt case and under which the receiver therein appointed is proceeding in this case to enforce the mortgage lien. The Clyatt suit appears to have been a friendly one, brought by Clyatt, Clarkson and Delouest "on behalf of themselves and all others who may be similarly situated and having like interests, who may join them as complainants in said cause," against the corporation as sole defendant, for the appointment of a receiver and the carrying out of a scheme of settlement agreed upon theretofore by a majority of the stockholders; the court's action being rendered necessary by [280] reason of the fact that unanimous written consent of the stockholders—the Ottensosers being of those who refused to concur—could not be had for the purpose of a voluntary settlement in pais. None of the parties complainant can be said to be in the class with the Ottensosers. Clyatt held free and unencumbered shares in series C of the capital stock; Clarkson shares in series D that had been borrowed on; Delouest held shares in series B that were fully matured, while the Ottensosers' shares that were borrowed on and are now being subjected are in series C. The only borrower represented, therefore, is Clarkson, who belongs to a later class than the Ottensosers, and who, therefore, would not, under the scheme, be subjected to so large a percentage of the premium bid. These complainants were all pecuniarily interested, therefore, in making the Ottensosers pay the pre-

mium as it redounded to their benefit. The relation between the association and the Ottensosers as borrowing members was also hostile. Whatever right the majority of a corporation may have to bind the minority to acts inimical to the latter, as stockholders that right will not be extended so as to allow the creditor to alter or change by his own ipse dixit the contractual or other obligation of the debtor.

Had we before us an intervention properly filed in the Clyatt case that raised questions of law or fact and passed upon by the court, a different question might be presented. The pleadings set up, as constituting the estoppel or res judicata, the matters hereinbefore pointed out, but in the agreed statement of facts we find that the Ottensosers filed "their 'protest' in the suit of W. W. Clyatt and others, against the Ocala Building and Loan Association prior to the judge's rendering the decree therein, the protest being directly and principally to the manner or plan of settlement as provided in said decree, the defendants protesting against any part of the premium being charged to the borrower and were represented by counsel, who made argument before the court in support of his protest against any part of [281] the premiums being charged to the borrower in the general plan of settlement decreed by the court. That at the time of the appointment of a receiver the defendants owed the largest amount to the association of any individual member," etc. We do not see that this act on the part of the defendants constituted them parties to the cause in such sort as to bind them. They did not control the case nor were they in position to appeal from the decree rendered, nor does it appear that any action by the court was had upon this "protest." The court, on the consideration of the directions to be given its receiver in the settlement of an insolvent concern, might seek light from any proper source and listen to suggestions from members of the bar who had studied the subject, but until it is called upon to pass its judgment upon some issue raised by proper pleadings before it, can it be said there is an adjudication? Nothing done in the Clyatt case gave those who "protested" the right to control the proceedings, to make defense, to adduce and cross-examine witnesses, nor to appeal from the decision, within the rule as to "parties in the larger sense" laid down in the leading case of Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626. See, also, Central Baptist Church & Society v. Manchester, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30. We think the

case before us clearly distinguishable in its facts from the facts as found by this court in the case of Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 South. 255, and that what we have said here is not in conflict with the decision therein rendered.

The decree is reversed, with directions to restate the account upon the principles above announced, and for such further proceedings as may accord with equity practice and with this opinion.

Taylor, C. J., and Hocker, J., concurring.

Shackleford and Whitfield, JJ., concur in the opinion.

[282] HOCKER, J., Concurring. It is contended that appellants, Fannie Ottensoser and L. Ottensoser, are estopped from questioning the propriety of the decree of the circuit court made in the case of W. W. Clyatt and Other Stockholders v. The Ocala Building and Loan Association, adjudging the association insolvent, appointing the receiver and fixing the terms of settlement with borrowing stockholders, because they filed before the court a protest against the plan of settlement which the bill prayed for and which the court adopted, and were represented by counsel in opposition to the plan. The following seem to be the facts: 1. The appellants were not parties to the suit. 2. The defense, if any was made, is not distinctly set forth, but it is inferable that the plan asked to be adopted had already been agreed to by a majority of the stockholders, and that the association did not by answer or otherwise oppose its adoption by the court. 3. It does not appear that any stockholder was a party defendant in that cause, and therefore there was no defendant before the court with an answer or other pleading setting up the defense that the plan agreed upon was inequitable or unjust to these appellants or any other stockholder. In other words, it does not appear that the pleadings raised any issue upon the propriety or equity of the agreed plan, and, therefore, 4. It does not appear that the pleadings were in a condition which permitted the defense that the plan was inequitable to these appellants by them or any one else. 5. It does not appear that appellants offered testimony, or that there was any issue made upon which they could have offered testimony, or that they in any manner controlled the defense, but, on the contrary, it rather appears that they did not control the defense. 6. It does not appear that they occupied any such relation to

that cause as would have enabled them to appeal [283] from the decree rendered, or on appeal have been able to present any issue to this court for decision; as the only defendant, the association occupied to these appellants a hostile position.

The foregoing facts are plainly inferable from the record.

In Greenleaf on Evidence, section 523, sixteenth edition, it is said: "It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound. Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject matter, and had a right to make a defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property." The several classes of privities are given in section 189 as follows: "Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and coparceners; privies in representation, as executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law." And in note 1 is given privity in tenure between landlord and tenant; privity in contract alone, or in the relation between lessor and lessee, or heir and tenant in dower, or by the curtesy, by the covenants of [284] the latter, after he has assigned his term to a stranger; privity in estate alone, between the lessee and the grantee of the reversion; and privity in both estate and contract, as between lessor and lessee.

In the case of Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 South. 255, Whitlock was held estopped by two judgments in ejectment, in which suits he had filed pleas asserting title in himself as owner, and alleging the other defendants to be his tenants. Whitlock therefore not only filed

pleas and defended the suits, but was privy in tenure with the other defendants in the suit. Under the law as above given he was therefore properly held to be estopped by the judgments against his lessee or tenant. But that case is clearly unlike the one at bar.

In Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626, annotated, the court quotes the law from Greenleaf as we have stated it, and says: "Parties in the larger sense are all persons having right to control proceedings, to make defense, to adduce and cross-examine witnesses and to appeal from the decision if an appeal lies. Only those, therefore, who have enjoyed all these privileges collectively should be concluded by decision, judgment or decree."

In the case of Central Baptist C. & S. v. Manchester, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30, the question was, "Is a person not a party to the record whose counsel is present and participates in the trial of a suit against his servant, agent or employé bound by the judgment rendered in the suit?" The court held he was not bound: 2 Black on Judgments, 2d ed., sec. 534. We do not think it essential to cite the many other authorities which are at hand. Applying the law as thus stated to the foregoing facts, we are unable to hold that the Ottensosers were so connected with the case of Clyatt v. Ocala B. & L. Assn. (the purpose of which suit was to procure a decree fixing the terms of settlement with borrowing members of an insolvent building and loan association, in which suit there was no party defendant representing the interests [285] of such borrowers, and no answer, plea or demurrer raising in their behalf any issue, either of law or fact) as parties, or under any relation of privity, so as to be bound by the decree made in that case. Nor are the defendants estopped by the conduct at the meeting of the stockholders, called August 7, 1901, for the purpose of procuring the assent of all the stockholders to the plan of settlement which was then adopted; for while they were represented at said meeting by proxy, they did not consent or agree to the said plan. The notice calling the meeting shows that it was not to be regarded as adopted unless all, or practically all, the stockholders consented thereto, and it also shows that, unless all, or practically all, the stockholders consented thereto, a resort would be had to the courts for the appointment of a receiver, and the record shows that this latter course was followed in the case of Clyatt v. Ocala B. & L. Assn. We cannot discover from these facts

that the appellants did anything upon which an estoppel could be predicated.

Presiding Judge Carter Dissented and said: "In Towle v. American Building etc. Soc., 61 Fed. 446, it was held that the receiver of an insolvent building and loan association, in adjusting settlement of mortgages given by members who had procured loans upon their stock, should charge them with the earned portion of the premium paid or agreed to be paid for the preference of loan. For reasons stated by Judge Grosscup in that case, and by Judge Green in Choisser v. Young, 69 Ill. App. 252, and others which occur to me, I think, upon principle, the appellants in this case should not be relieved from payment of the earned portion of the premium bid by them for the preference of loan estimated upon an equitable basis. There are numerous decisions, however, which repudiate this rule and relieve the borrowing member from paying any part of the premium, though it seems if the assets are not sufficient to enable the receiver to deal with each stockholder and mortgagor on that basis without resulting in an unequal division of the assets among the stockholders, the other rule will be followed: Whitehead v. Commercial Building etc. Assn., 64 N. J. Eq. 24, 53 Atl. 679.

"Numerically speaking, the cases sustaining the rule that no part of the premium is to be charged as against those sustaining the other rule, are as many to few, the multitude to several. I have examined all of the cases which I have been able to find in the library sustaining the majority rule, but none of them advance sufficient reasons to convince me of its correctness. I realize the responsibility resting upon a judge who refuses to follow what is termed the great weight of authority, but with my present convictions, formed after as mature consideration of the question as I am capable of giving it, I shall accept that responsibility in the present case.

"In Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190, 20 South. 255, it is said: 'It has been frequently held that if a party is interested in the subject matter of a suit, and does in fact appear and exercise the right of participation in the defense, as if he were a technical party upon record, he cannot afterward be heard to contend that he is not bound and concluded by the judgment or decree to the same extent that he would have been if made a technical party to the proceeding.' This statement of the law, it will be noted, is taken almost literally from the decision in Parr v. State, 71 Md. 220, 17 Atl. 1020. I am unable to see why the decree appointing the receiver, and instructing him as to settlements, is not binding upon the appellants, under these rules of law, as they were unquestionably interested, both as stockholders and borrowers, in the plan of settlement decreed, and in winding up the affairs of the association. The plan adopted by the court was one recommended by a majority of the stockholders before any suit was instituted, but which failed for want of the unanimous consent of all stockholders. The appel-

lants were heard in opposition to this plan before it was decreed by the court, upon a protest filed by them, and they should be bound by that decision. I think the filing of the protest by parties interested and entitled to intervene, as these parties unquestionably were, the recognition by the court of their right to file such protest and to be heard thereon, and the presentation of such protest by the parties, and the hearing thereon, constituted them real parties by intervention, though no formal order was asked or made admitting them as parties to the record.

"The court, after hearing argument upon such protest, overruled it by instructing the receiver to collect the earned premium; and I see no reason why an appeal could not have been taken from the decree, if the parties so desired. They undoubtedly had a right to present any pertinent evidence in support of their protest, and to control the proceeding so far as the protest was concerned; and I think they had the right to appeal from the decree, if that be considered an essential element in determining the question. The circuit court evidently regarded the Ottensosers as parties, not merely as members of the bar making suggestions, and they were given a hearing as such. They submitted their interest to the consideration of the court by a written paper filed in the suit, and invited the adjudication had thereon, which was rendered only after a hearing such as is usually given to parties entitled to be heard. The receiver has proceeded to administer the trust under the decree appointing him, and three dividends were declared before the final decree was rendered in this case. If other borrowing stockholders are required to settle in accordance with the instructions given the receiver—and I assume they are, as dividends are being declared—it certainly would be inequitable to relieve the appellants from earned premiums and at the same time permit them to share in the earned premiums paid by other borrowing stockholders. I think there is no error in the decree in respect to those matters complained of, and that therefore it should be affirmed."

The Insolvency of Building and Loan Associations as affecting the rights and liabilities of members is discussed in the monographic note to Curtis v. Granite State Provident Assn., 61 Am. St. Rep. 24-30. As to the right of borrowing members to credits for interest, dues, and premiums paid, when the association becomes insolvent, see Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351; Spinney v. Chapman, 121 Iowa, 38, 100 Am. St. Rep. 305; People's Bldg. etc. Assn. v. McPhilamy, 81 Miss. 61, 95 Am. St. Rep. 454; Globe Bldg. etc. Assn. v. Wood, 110 Ky. 4, 96 Am. St. Rep. 417. It is held in Knutson v. Northwestern Loan etc. Assn., 67 Minn. 201, 64 Am. St. Rep. 410, that they are not entitled to set off all they have paid against an advancement or loan received, but only so much as remains after deducting what the court is fully satisfied will meet their shares of the shortage.

If Stockholders in a Loan Association are not parties to an action in which a method is prescribed for settling with its borrowing members, they are not bound thereby: Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351. As to who are "parties" within meaning of the rule of res judicata, see the note to Hill v. Bain, 2 Am. St. Rep. 877.

CASES

IN THE

SUPREME COURT

OF

GEORGIA.

THROWER v. CITY OF ATLANTA.

[124 Ga. 1, 52 S. E. 76.]

MUNICIPAL CORPORATIONS—Ordinance Making Penal an Act Prohibited by Statute.—A municipality cannot by ordinance prohibit that which is already made penal by state statute, unless there is express and specific legislative authority therefor. (p. 148.)

MUNICIPAL CORPORATIONS—Ordinance Prohibiting Gambling Already Prohibited by Statute.—A city cannot, in the absence of express legislative authority, make penal acts which are already prohibited by state statute against keeping gaming-houses. (p. 149.)

R. R. Arnold and H. Hill, for the plaintiffs in error.

J. L. Mayson and W. P. Hill, for the defendant in error.

[1] CANDLER, J. The plaintiffs in error, Thrower and Jones, were tried in the recorder's court of the city of Atlanta for the alleged violation of a municipal ordinance of which the following is a copy: "It shall be unlawful for any person, firm or corporation, agent or employé thereof, to maintain or carry on any office or place of business, or to have a space or portion of the office, store or place of business of another, or to maintain a place or point of meeting, in or at which any person or persons is or are allowed to bet, or offer to bet, or place an order for a bet, or telegraph or telephone bets, on horse races, boat races, bicycle races, or any kind or description of race, whether such race is to be run in the city of Atlanta or any place outside of said city." They were adjudged guilty and fined by the recorder; whereupon they presented to the judge of the superior court of Fulton county

their petitions for certiorari, which were [2] denied, and they excepted. As the evidence in the two cases was identical, and both are governed by the same principles of law, they will be considered together.

In the view that we take of this case it is not necessary to consider the question whether the evidence introduced on the trial was sufficient to show a violation of the ordinance which has been quoted. We are confronted by the broader question whether the ordinance was invalid, in that it undertook to make penal that which was already prohibited by the state law making penal the keeping of a gaming-house; and this question we feel constrained to decide in the affirmative. The very evident purpose of the ordinance was to prevent the maintenance of a "place" of any sort, whether on premises owned by another, on the public streets, or elsewhere, where betting of the character designated was permitted. That this is fully covered by the statute against keeping a gaming-house (Pen. Code, sec. 398) has been distinctly held by this court. In Thrower v. State, 117 Ga. 753, 45 S. E. 126, which was an indictment under the Penal Code, section 398, for keeping a gaming-house, Mr. Justice Lamar, speaking for the court, said: "In prohibiting a gaming-house it is intended to prevent the maintenance of a place at which persons come together for the purpose of hazarding and betting money." Clearly, then, if the plaintiffs in error in the present cases were guilty of a violation of the municipal ordinance which has been quoted, they are guilty of a violation of the state law against keeping a gaming-house; and the familiar principle that a municipality may not prohibit by ordinance that which is already made penal by state statute, unless there is express and specific legislative authority for the same, will apply. The case of Penniston v. Newman, 117 Ga. 700, 45 S. E. 65, is closely in point. There an ordinance of the city of Newman provided that it should be unlawful for any person to keep an open business house on the Sabbath day, or to trade or traffic on that day, or to work or cause work to be done on the Sabbath, the ordinance containing a proviso that it should not prevent the sale of drugs or the carrying on of works of necessity on the Sabbath day. The accused, who was the proprietor of a drug-store, kept open his place of business on the Sabbath day, and his clerks therein sold tobacco and cigars. He was convicted in the police court, his petition for certiorari was overruled, and he brought the case to this

court, where the judgment was reversed on the ground that the offense proved against [3] him was punishable under the Penal Code, section 422, making it penal for any person to pursue his business or the work of his ordinary calling on the Lord's day, and that it could not be punished by the municipality. The case of Hood v. Von Glahn, 88 Ga. 405, 14 S. E. 564, relied on by counsel for the city, and the more recent one of Littlejohn v. Stells, 123 Ga. 427, 51 S. E. 390, are not in point, for the reason that in those cases the municipal ordinances which were attacked had been authorized by express legislative enactment, while it is not claimed that the city in this case had any such legislative authority. Nor is the case of Odell v. City of Atlanta, 97 Ga. 670, 25 S. E. 173, in conflict with what is here held. The dictum of Mr. Justice Lumpkin in the Odell case, to the effect that the city, under the "general welfare" clause of its charter, had the right to break up the "business" of selling pools on horse races, was fully explained in the case of Thrower v. State, 117 Ga. 753, 45 S. E. 126, on the ground that the court in the case first mentioned was dealing solely with the legality of the alleged business or occupation, and did not have before it the question whether the city could make penal acts which were already prohibited by the state law against keeping gaming-houses.

From what has been said it follows that the court erred in refusing to sanction the petition for certiorari.

Judgment reversed.

All the justices concur, except Beck, J., who did not preside.

POWER OF MUNICIPALITY TO MAKE CRIMINAL AND PUNISH ACTS ALREADY COVERED BY STATUTE.

I. Express Legislative Authority, 149.
II. Inherent Power of Municipality,
III. Prohibiting Acts Prohibited by Statute, 155.
IV. Effect of Passage of General Statute, 155.
V. Ordinance Imposing Different Penalty, 156.

I. Express Legislative Authority.

Unquestionably, a city may be expressly authorized by statute to provide by ordinance for the punishment of an act already made punishable by the criminal law of the state: Williams v. City of Warsaw, 60 Ind. 457. The legislature may expressly delegate to municipal corporations power to adopt and enforce ordinances on mat-

ters of special local importance, though general statutes exist relating to the same subjects. The same act may constitute a crime against the public law of the state, and also a petty offense against a municipal regulation. The two offenses in such case being different, each may be punished without violation of the constitutional inhibition against placing one twice in jeopardy for the same offense: McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; State v. Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249, 30 South. 187. Although an act is a penal offense under the laws of the state, further penalties for its commission may, under proper legislative authority, be imposed by municipal laws or ordinance, and the enforcement of the one does not preclude the enforcement of the other: State v. Newman, 96 Wis. 258, 71 N. W. 438. The legislature may expressly authorize a municipal government to impose new and additional penalties for the commission of acts already made penal by the laws of the state: State v. Ludwig, 21 Minn. 202; City of Brooklyn v. Toynlee, 31 Barb. 282; Polinsky v. People, 11 Hun, 390. "The legislature may undoubtedly delegate to municipal corporations power to adopt and enforce by-laws or ordinances on matters of special local importance, even though general statutes exist relating to the same subjects. An ordinance must be authorized, and must not be repugnant to a statute in force over the same territorial area; but if there be no conflict between the provisions of the statute and the ordinance save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question that the same act may constitute two offenses, viz., a crime against the public law of the state, and also a petty offense against a local municipal ordinance. The weight of authority likewise fairly sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other. Though if it be not so provided by statute, every fair-minded judge will, when pronouncing judgment in the second prosecution, consider a penalty already suffered": McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516. If a department of a city government is expressly authorized by the legislature to pass ordinances relating to some particular subject, such ordinances are not rendered void or inoperative by the fact that the acts forbidden by the ordinances are also forbidden by some general law applicable to the whole state: Polinsky v. People, 11 Hun, 390.

II. Inherent Power of Municipality.

As to whether or not a municipal corporation may, without express authority, lawfully legislate criminally against the commission of such acts as are already covered and made criminal by the state law, is a question upon which the authorities are in hopeless conflict, sometimes even in the same state, and they cannot be reconciled upon any hypothesis whatever. We believe the sounder rule to be that a city, under the usual grant of power contained in city charters, and generally known as the general welfare clause, cannot by ordinance

declare those acts offenses against the city which by the general statutes of the state are defined and made punishable as offenses against the state. In other words, that in order to pass valid ordinances covering such offenses as are already covered by state law, the city must have express power granted to it for that purpose by the legislature, and that under the police power inherently vested in it, a city has no power to punish for an offense which is a crime against the state. This doctrine is supported by numerous cases, among which may be cited: State v. Welch, 36 Conn. 215; Mayor of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452; Jenkins v. Mayor of Thomasville, 35 Ga. 145; Lockwood v. Muhlberg, 124 Ga. 660, 53 S. E. 92; In re Ridenbaugh, 5 Idaho, 371, 49 Pac. 12; Loeb v. City of Attica, 82 Ind. 175, 42 Am. Rep. 494; Town of New Hampton v. Conroy, 56 Iowa, 498, 9 N. W. 417; Ex parte Bourgeois, 60 Miss. 663, 45 Am. Rep. 420; Town of Washington v. Hammond, 76 N. C. 33; State v. Keith, 94 N. C. 933; State v. McCoy, 116 N. C. 1059, 21 S. E. 690; City of Corvallis v. Carlile, 10 Or. 139, 45 Am. Rep. 134; Petition of Baxter, 12 R. I. 13; Robinson v. Mayor of Franklin, 1 Humph. 156, 34 Am. Dec. 625; Ex parte Wickson (Tex. Cr. App.), 47 S. W. 643; Ex parte Powell, 43 Tex. Cr. App. 391, 66 S. W. 298; Ex parte Ogden, 43 Tex. Cr. App. 531, 66 S. W. 1100; Clark v. State, 46 Tex. Cr. App. 566, 81 S. W. 722; Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413; State v. Godfrey, 54 W. Va. 54, 46 S. E. 185; Ex parte Smith, Hempst. 201, Fed. Cas. No. 12,967a.

The cases above referred to all maintain that under a general grant a city has no power by ordinance to punish for offenses provided for by the general laws of the state, and that such ordinances are absolutely void. Thus, so far as a general statute covers the same ground as a city by-law, both cannot be enforced so as to subject the offender to a double penalty. But the operation of a city by-law is not affected as to any ground not covered by the statute: State v. Welch, 36 Conn. 215. A municipal corporation, it has been again and again determined, has no power to pass an ordinance punishing precisely the same acts which are punishable under the general laws of the state: In re Sic, 73 Cal. 142, 14 Pac. 405, followed in Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86. In the case of In re Sic, 73 Cal. 142, 14 Pac. 405, it was said: "In Dillon on Municipal Corporations, section 68, after noticing the great conflict in the authorities, the following rules are laid down, it is said, with some distrust as to their correctness:

"'1. A general grant of power, such as mere authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act, for example, an assault and battery, which is made punishable as a criminal offense by the laws of the state.

"'2. Where the act is in its nature one which constitutes two offenses, one against the state and one against the municipal govern-

ment, the latter may be constitutionally authorized to punish it, though it be also an offense under the state law; but the legislative intention that this may be done should be manifest and unmistakable, or the power in the corporation should be held not to exist.

"'3. Where the act or matter covered by the charter or ordinance and by the state law is not essentially criminal in its nature, and is one which is generally confined to the supervision and control of the local government of cities and towns, but it is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties and fully provided for in general laws.'

"The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one, and these rules perhaps express the law as we understand it as well as any.

"If, as held by both Bishop and Dillon to be the effect of the authorities, a municipality can only pass ordinances punishing the same acts which are punishable under general laws when expressly authorized to do so, and that no authority to pass such laws will be presumed from grants of power general in their character, it must be because such ordinances may supersede the general law upon the subject. Here there is not only no such authority, but if such ordinances are conflicting, there cannot be such authority. It would seem that an ordinance must be conflicting with the general law, which may operate to prevent a prosecution under the general law. The constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice": In re Sic, 73 Cal. 142, 14 Pac. 405. In Ex parte Bourgeois, 60 Miss. 663, 45 Am. Rep. 420, it was again said that: "We held in Johnson v. State, 59 Miss. 543, that it was competent for the legislature to delegate to a municipality the right to make acts which were punishable by the state punishable also by the municipal authorities when committed within their corporate limits. And while the cases elsewhere are not harmonious, the doctrine announced by us is said by Judge Cooley to be supported 'by the clear weight of authority': Cooley's Constitutional Limitations, 199, note 4.

Whether this power to declare acts criminal under the general laws of the state punishable also under town ordinances, and thus inflict double punishment for the same offense can be deduced from a grant in a city charter of authority to make by-laws and ordinances for the welfare and good government of the city, or other general words of similar import, is a question upon which the authorities are in hopeless conflict. The various cases are collected and grouped in the note to 1 Dillon on Municipal Corporations, 3d ed., sec. 368.

An examination of them leads the author to the conclusion, expressed with some diffidence, that this power of double punishment for a single act on this delegation of authority to a local municipality to punish acts which are crimes against the state, by a mode of procedure and degree of punishment unknown to the state law, cannot be inferred from a mere general authority to legislate for the good government of the municipality, but must be clearly given, and if not so given, does not exist. An investigation of the cases, and a consideration of the principles on which they rest, induce us to accept Judge Dillon's conclusion, and this conclusion is fatal to the validity of the ordinance here in question'': Ex parte Bourgeois, 60 Miss. 663, 45 Am. Rep. 420.

Some consideration is due those cases which maintain that without any express authority delegated to it by the legislature a city may pass and enforce an ordinance making penal, and providing for the punishment for the commission of, an act which is already made penal by and punishable under the general statute of the state. On this subject the court in the case of Judy v. Lashley, 50 W. Va. 628-631, said that: ''On this question there is much conflict in the decisions of the various states. In New York and Alabama and Missouri, and some other states, it has been held that, under a general authority delegated by the legislature, such as to preserve the peace and regulate the police, a municipal corporation may impose penalties for the commission of acts which, by the state law, are declared to be crimes: Mayor v. Rouse, 8 Ala. 515; Intendant of Greensboro v. Mullins, 13 Ala. 341; Mayor of Mobile v. Alliare, 14 Ala. 400; City of Amboy v. Sleeper, 31 Ill. 499; Levy v. State, 6 Ind. 281; City of St. Louis v. Bentz, 11 Mo. 61; State v. Gordon, 60 Mo. 383; City of Brownville v. Cook, 4 Neb. 101; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493. In some of the cases it is further held that a conviction under an ordinance may be pleaded in bar of a prosecution in a state court for the same act: State v. Cowan, 29 Mo. 330. This is on the ground that the constitution forbids that a person shall be twice punished for the same offense. There is another class of cases which hold that the party may be punished under both the state and the municipal law: Slaughter v. People, 2 Doug. (Mich.) 334; Fox v. State, 5 How. (U. S.) 410, 12 L. ed. 213; Moore v. People, 14 How. (U. S.) 13, 14 L. ed. 306.

Among the other cases which maintain that both the state law and a municipal ordinance may validly provide for the punishment of the same offense or impose a penalty for its commission may be cited: Byers v. Town of Olney, 16 Ill. 35; Town of Bloomfield v. Trimble, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. 586; In re Jahn, 55 Kan. 694, 41 Pac. 956; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Ex parte Douglass, 1 Utah, 108. In Louisiana it is maintained that though the doing of any particular act is punishable under the state law, a city may, by ordinance, provide a punishment for the commission of the same act: City of

Monroe v. Hardy, 46 La. Ann. 1232, 15 South. 696; Board of Police v. Giron, 46 La. Ann. 1364, 16 South. 190. In Ex parte Freeland, 38 Tex. Cr. 321, 42 S. W. 295, it was decided that an affray was a petty offense, and although a statutory crime, it might be legally made by city ordinance a municipal offense, but where this is done a prosecution and conviction under the ordinance for the municipal offense bars a prosecution for the same offense in the state courts under the statute.

Even in Georgia it has been held that a municipal ordinance making it penal for any person to be found "idling, loitering, or loafing upon the streets of the city" was not void as an effort to punish for the same acts which are embraced within the state laws against vagrancy, but the decision was placed upon the ground that the state statute was not broad enough to cover the specific acts named in such ordinance: Taylor v. City of Sandersville, 118 Ga. 63, 44 S. E. 845.

The question under consideration has been before the various courts in the state of Missouri many times for determination, and the uniform holding in that state has been, that though an act is made criminal and punishable by the general laws of the state, a municipality may also make it punishable and authorize proceedings for the imposition of such punishment: City of St. Louis v. Bentz, 11 Mo. 61; City of St. Louis v. Cafferata, 24 Mo. 94; City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791; State v. Wallbridge, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 457; City of Plattsburg v. Trimble, 46 Mo. App. 459. It is the well-settled law of Missouri that municipal corporations may, by ordinance, prohibit acts which are made misdemeanors under the general laws of the state, and for a violation of such ordinances, the city may maintain a proceeding in its own name to impose and collect a fine: City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791; City of Plattsburg v. Trimble, 46 Mo. App. 459. While it is admitted that the ordinances of a city must be in harmony with the general laws of the state, it is said that such ordinances as those under consideration, though they cover and inflict punishment for the commission of the same act that is made punishable by the state law, are not in conflict therewith, as both the state and the city may punish separately for the commission of the same offense: City of Linneus v. Dusky, 19 Mo. App. 20. Some of the cases in that state hold that the fact that an offense is a misdemeanor under the general law of the state does not prevent a city under its general powers from providing by ordinance for the punishment of such offense, and that a proceeding by a city to collect a fine under such an ordinance, though possessing some of the elements of a criminal prosecution, is, nevertheless, a civil action: City of De Soto v. Brown, 44 Mo. App. 148; Kansas City v. Neal, 49 Mo. App. 72. When this view is taken, it is maintained that a conviction under a city ordinance is not a bar to a prosecution for the same act based on a state statute, because the prosecution under the ordinance and the imposition of a fine is a mere civil proceeding: State v. Muir,

164 Mo. 610, 65 S. W. 285; State v. Muir, 86 Mo. App. 642; and that an acquittal or conviction under the city ordinance is no bar to a prosecution for the same offense by the state, nor is a conviction or acquittal under the state law any bar to a prosecution for the same offense by a city: City of Lebanon v. Gordon, 99 Mo. App. 277, 73 S. W. 222.

III. Permitting Acts Prohibited by Statute.

Municipal ordinances which permit the commission of acts which are prohibited by the state statute are null and void. Thus, where in the schedule of licenses established by an ordinance, there is included an occupation which is prohibited, under a penalty, by the state statute, such ordinance, in so far as it licenses such occupation, is null and void, and an act of the legislature adopting the schedule of licenses as established by such ordinance is unconstitutional, as violative of a constitutional provision declaring that the general assembly has no power to authorize a municipality to pass laws inconsistent with the general laws of the state: Hewlett v. Camp, 115 Ala. 499, 22 South. 137. An ordinance to be valid, unless special legislative authority be given for its enactment, must not conflict with a statute, but must conform to the laws of the state. An ordinance, therefore, of the council of a city organized under the general incorporation act which provides that merchants and others may sell goods on Sundays between certain hours is invalid because in conflict with a statute of the state declaring a barter or sale of goods, wares or merchandise on Sunday to be a penal offense against the state: Flood v. State, 19 Tex. App. 584; Bohmy v. State, 21 Tex. App. 597, 2 S. W. 886. On an information against a person for a violation of a statute against gaming by playing at a particular game, an ordinance of a municipal corporation authorizing the game, and the receipt of the city treasurer for the price of a license to exhibit the game during the time when the alleged breach of the statute occurred are inadmissible: State v. Caldwell, 3 La. Ann. 435.

IV. Effect of Passage of General Statute.

Although a given act is, by a valid municipal ordinance, made an offense against the corporation, at a time when such an act was not indictable or punishable under the criminal laws of the state, the subsequent enactment of a general statute making the same act a crime or misdemeanor deprives the municipal authorities of the power to try and punish offenders for committing the act in question within city limits: Strauss v. City of Waycross, 97 Ga. 475, 25 S. E. 329. A municipal ordinance prohibiting a certain act under a penalty is abrogated by a general law of the state, passed subsequently to the granting of the city charter, and prohibiting the doing of the same act under a penalty, and it makes no difference whether such ordinance was enacted before or after the passage of the general law, and it follows that no prosecution can be maintained under the ordinance for the doing of such act after the passage of such general law;

Southport v. Ogden, 23 Conn. 128. If, however, a special grant of power is conferred by the legislature in the charter granted to a city to pass and enforce ordinances to suppress and punish certain acts, such power is not recalled by a subsequent general statute providing for the prosecution of the same acts as offenses against and throughout the state: State v. Labatut, 39 La. Ann. 516, 2 South. 550; Ex parte Schmidt, 24 S. C. 263.

V. Ordinance Imposing Different Penalty.

The legislature may expressly authorize a municipal corporation to impose new and additional penalties for acts already made penal by the laws of the state: State v. Ludwig, 21 Minn. 202; City of Brooklyn v. Toynbee, 31 Barb. 282. But in the absence of such express authority, an ordinance imposing a greater penalty on the doing of an act than that imposed by the state statute is void: State v. Chase, 33 La. Ann. 287; State v. Burns, 45 La. Ann. 34, 11 South. 878; Horn v. Chicago etc. Ry. Co., 38 Wis. 463. Thus when the charter of a town authorizes its board of trustees to inflict such punishment for any offense against the laws of the corporation as may be provided by law for like offenses against the laws of the state, this does not authorize the passage of an ordinance imposing a fine of from five to fifty dollars for an assault when the minimum fine for such offense, under the state law, is three dollars: Town of Petersburg v. Metzker, 21 Ill. 205. If the state constitution prohibits municipalities from fixing by ordinance a penalty for a violation thereof at less than that imposed by statute for the same offense, and the municipal legislative board is authorized by statute to pass ordinances affixing penalties for a violation thereof, such board may in its discretion fix the penalty for the doing of an illegal act at any reasonable sum, provided it is not less than the penalty fixed by statute for the same offense: City of Owensboro v. Sparks, 99 Ky. 351, 36 S. W. 4. But under such a constitutional provision a city ordinance fixing a less penalty for an offense than that fixed by statute for the same offense is void: Taylor v. City of Owensboro, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948. Such constitutional provision has no application to fines imposed by a municipality for the violation of a purely local ordinance, the subject of which is not covered by a general statute: City of Carlisle v. Heckinger, 103 Ky. 381, 45 S. W. 358.

It has been decided that where the state law provides as a penalty for the obstruction of the streets of towns a fine not to exceed five hundred dollars, a city ordinance punishing the obstruction of its streets not in excess of twenty-five dollars, is in conflict with the state law and void: Ex parte Cross, 44 Tex. Cr. App. 376, 71 S. W. 289. And, on the other hand, it has also been decided that a city ordinance is not invalid merely because it provides a minimum punishment for its violation, while the state law on the same subject does not: Board of Police v. Giron, 46 La. Ann. 1364, 16 South. 190. And that a municipal ordinance prohibiting certain acts and providing for a penalty of not less than twenty-five nor more than two

hundred and fifty dollars against the person committing such acts is not repugnant to a general statute on the subject prescribing a penalty not to exceed one thousand dollars: Kansas City v. Hallett, 59 Mo. App. 160; City of St. Joseph v. Vesper, 59 Mo. App. 459.

If the constitution prohibits any municipal corporation from imposing a greater license tax than is imposed by the legislature for state purposes, such corporation cannot impose any such tax on a trade or calling not subjected to a state license tax by the legislature: City of New Orleans v. Graves, 34 La. Ann. 840.

WATSON v. AUGUSTA BREWING COMPANY.

[124 Ga. 121, 52 S. E. 152.]

NEGLIGENCE—Manufacturer's Liability to Third Person.—A manufacturer who makes, bottles and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, is under legal duty to see that in the process of bottling no foreign substance is mixed with such beverage which, if taken into the human stomach, will be injurious. One who, relying on such obligation without negligence, swallows pieces of glass while drinking such beverage from a bottle, may recover for injuries sustained thereby. (pp. 157, 158.)

NEGLIGENCE—Manufacturer's Liability to Third Person—Damage for Mental Suffering.—If a manufacturer of soda-water makes, bottles, and sells it to retail trade, a third person who purchases a bottle thereof, and in drinking it swallows several pieces of glass, which are subsequently removed from his stomach, and he is apparently restored to his former condition of health, may recover of the manufacturer for his mental suffering caused by fear of death while the glass was in his stomach, but not for a fear, after its removal, that some time in the future he will again suffer from the injury caused by the glass before its removal. (p. 159.)

G. L. Callaway, for the plaintiff.

W. H. Barrett, for the defendant.

123 CANDLER, J. 1. When a manufacturer makes, bottles and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious. The case of Woodward v. Miller, 119 Ga. 618, 100 Am. St. Rep. 188, 46 S. E. 847, 64 L. R. A. 932, is hardly in point; for in that case the manufacturer knew of the defect and fraudulently concealed it from the purchaser. Blood Balm

Co. v. Cooper, 83 Ga. 457, 20 Am. St. Rep. 324, 18 S. E. 118, 5 L. R. A. 612, while differing somewhat as to its facts, furnishes strong reasoning to support the principle announced. The composition of patent or propriety medicines is usally shrouded in mystery, and it is generally understood that many such remedies contain ingredients which, if taken in sufficient quantities, will produce injurious results upon the person taking them. If, then, one who buys a patent medicine may rely upon the obligation of the manufacturer not to place therein ingredients which, if taken in the prescribed doses, will injure his health, certainly the purchaser of an alleged harmless and refreshing beverage should have the right to rest secure in the assumption that he will not be fed on broken glass. It does not matter that the plaintiff in the present case did not buy the soda-water from the defendant, or that there was no [124] privity of relationship between them. The duty not negligently to injure is due by the manufacturer, in a case of the particular character of the one under consideration, not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended. On this subject see, also, Blood Balm Co. v. Cooper, 83 Ga. 457, 20 Am. St. Rep. 324, 18 S. E. 118, 5 L. R. A. 612.

2. It follows from what has been ruled that the court below erred in sustaining the general demurrer. We are equally clear that many of the grounds of the special demurrer are without merit. While the petition contains the wholly unnecessary allegation that the dealer who purchased the soda-water from the defendant relied upon its implied warranty that the drink was harmless, the suit cannot by any possibility be construed as one upon a warranty, as it is plainly an action in tort. While there is no distinct allegation of permanent disability, the physical suffering of the plaintiff growing out of the swallowing of the glass and its removal from his stomach was set out with sufficient definiteness to furnish a basis of recovery; that there was no lack of the required definiteness as to the time, place, and manner of the defendant's negligence. In the latter particular the case differs from Hudgins v. Coca Cola Bottling Co., 122 Ga. 695, 50 S. E. 974, in that there the petition was entirely silent as to what constituted the negligence complained of, while here it is distinctly alleged that the defendant was negligent in leaving glass in the bottle when it was filled. A somewhat peculiar ground of demurrer is the one which seeks to place upon the plaintiff the onus of

showing "the size and kind of glass" that he swallowed. Courts have gone far in requiring particularity of pleading, but we are not aware of any rule which would require a man who has unconsciously swallowed several pieces of glass to make a note of the shape, size, color and character of the pieces after they have been removed from his stomach, in order to describe them in bringing suit to recover from the one who is responsible for his having swallowed them. It was not necessary to allege that the defendant intended that the bottles containing its soda-water should be used as drinking vessels; it is sufficient for the purposes of this suit that such was the custom and it was cognizant thereof.

The only remaining point to be considered is whether or not the plaintiff in this case can recover from mental suffering growing out of his injury; and if so, to what extent. It is a familiar principle [125] that where a physical injury has been sustained the person injured may recover for mental suffering caused by or growing out of his bodily hurt. One may not recover, however, for mental suffering which is not reasonable, or which is merely fanciful. It can hardly be disputed that a reasonable fear of death constitutes mental suffering of a very keen sort. It is not unreasonable, we think, for one who has swallowed several pieces of glass to entertain a very vivid and poignant apprehension of an untimely end; and the mental anguish caused by this dread may constitute an element of damage in a suit for damages on account of the physical injury. But after the glass has been removed from his stomach and he is apparently restored to his former condition of health and vigor, his fears, so far as a damage suit are concerned, should cease. He may not continue for an indefinite period to vex his soul with dread on account of having been "cut on the inside," and hold the defendant liable for his apprehensions. It follows, therefore, that so much of the petition as seeks to recover on account of mental suffering endured since the glass was removed from the plaintiff's stomach should be stricken; and direction is given that when the case is tried again the special demurrer be sustained in so far as it attacks his portion of the petition.

Judgment reversed with direction.

All the justices concur.

A Discussion of the Principles involved in the principal case will be found in the monographic note to Woodward v. Miller, 100 Am. St. Rep. 192-203. It has recently been decided that where a bottler of champagne cider sells it without knowledge that the bottles are charged improperly, he is not liable to the buyer's employé who is injured by the explosion of one of the bottles: O'Neill v. James, 138 Mich. 567, post, p. 321. For a somewhat similar case, see Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932.

IVEY v. COWART.

[124 Ga. 159, 52 S. E. 436.]

BOUNDARIES—Evidence.—If, in case of a dispute as to the boundary between two tracts of land, evidence is introduced to show the amount of land contained in certain lots, it is permissible, in rebuttal, to introduce tax returns of the defendants, while claiming as owners, to show that they returned the lots as containing less land than their evidence showed. (p. 161.)

BOUNDARIES—Evidence.—In case of a dispute as to boundary between two tracts, evidence that when a prior survey of the land was made a proposition was made by one of the parties to the other to the present dispute to begin a survey at a point which the proposer claimed was undisputed, and that the decision based upon the line thus run should be final, if rejected by the adverse party at the time, is not admissible in behalf of the party making the proposition. (pp. 161, 162.)

BOUNDARIES—Traditionary Evidence.—If a public boundary, such as a county line, is the dividing line between two lots, the facts of use and occupancy by other neighboring land owners, whose land is also bounded by the county line, for more than twenty years up to a certain line as the county line, erecting fences, and treating it as the county line, and the fact that such line coincides with that claimed by one of the parties to the dispute concerning the true boundary line, is admissible in evidence, but such traditionary evidence is not conclusive on the other party to the dispute as to the location of the county line, and its weight is to be determined by the jury. (p. 163.)

BOUNDARIES—Establishment by Acquiescence.—Acquiescence for seven years by acts and declarations of adjoining land owners establishes a dividing line, but if different lots of land are described as being bounded by a line between two counties, acquiescence for seven years by owners of some of the lands thus bounded is not conclusive as to the true location of the line as against others whose lands touched the line at a different point. (p. 163.)

BOUNDARIES by Acquiescence.—If the location of a boundary line is uncertain, and the parties to the controversy about its true location, or their predecessors in title while holding it, have acquiesced by acts or declarations for seven years or more in a dividing line between their lots, this would establish it as to them. (p. 163.)

TRESPASS—Damages.—In an equitable action to recover land, to enjoin a trespass, and to recover damages against several defendants as trespassers, there is no error in refusing to charge that "if the evidence showed that the title and possession of the defendants was not joint, or failed to show that the acts of trespass complained

of were not committed by them jointly, then there could be no recovery." (p. 164.)

TRESPASS—Damages.—If several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. The jury may by their verdict specify the particular damages to be recovered of each, and judgment will then be entered severally. But the defendants are not entitled to have damages apportioned by the verdict. Some of the defendants may be found to be trespassers, and a recovery may be had against them, while some may be found not to be trespassers. (p. 165.)

W. C. Worrill and W. D. Sheffield, for the plaintiffs in error.

A. G. Powell, for the defendant in error.

160 LUMPKIN, J. The parties were in controversy as to the location of the line betwen lot No. 400 in the sixth district of Early county, and lots Nos. 381 and 382 in the seventh district of Baker county. Land lot No. 381 was a fractional lot, as was also lot No. 380, which lay just east of it. In seeking to determine where the line between Baker and Early counties ran, evidence was introduced as to the contents of various lots, and what effect as to the settlements upon some of the lots the establishing of the line in one place or another would have. Thus it was contended that lot No. 381 contained fifty acres. Plaintiff responded by introducing the tax returns to one of the defendants, showing that it had been returned as ten acres. The returns of this defendant as to other adjacent lots for that year were introduced, and the tax returns of another defendant for a preceding year were also introduced. Each return was made while the defendant making it claimed the land. These were admissible and tended to throw some light on the question at issue. As to the admissibility of tax returns as admissions, see Tolleson v. Posey, 32 Ga. 372; Lynch v. 161 Lively, 32 Ga. 575; Smith v. Haire, 58 Ga. 446; Mashburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97. One of the returns introduced contained lot No. 337, which does not appear to have been a contiguous lot. The only possible relevancy of this, so far as we can perceive, was to explain the difference in the quantity of land included in the two returns; and this was no doubt the purpose of its introduction.

2. Evidence was introduced, over objection, that when processioners of Baker county ran the line between the property of the plaintiff and that of M. A. V. Ivey, one of the defendants (who appears to be the defendant called Mollie Ivey in the

declaration), R. F. Ivey, another defendant, representing her, was present; that plaintiff proposed to him that they with the processioners should go south to a place about seven or eight miles distant where the line between Baker and Early counties was undisputed and run it from that point, and that both should abide by it and agree to make the decision final; but that R. F. Ivey refused. This ruling was hurtful error. A proposition to begin a survey at a point which the proposer claimed was undisputed, and that the decision based upon the line thus run should be final, which was rejected by the adverse side, was not admissible in behalf of the person making the proposition. The possible injury which may have resulted from this error is made clear by another ground of the motion for new trial, which alleges that counsel for plaintiff commented on this testimony and urged that it showed R. F. Ivey to be unfair and acting in bad faith in his contention as to the line claimed, and that his testimony was therefore unreliable.

3. The line between the property of the plaintiff and that of the defendant coincided with the county line between Baker and Early counties, which both sides treated as being a straight line. Evidence was admitted to show that for a considerable distance south of the place where the line was in dispute owners of land in Baker and Early counties bounded by the county line had built dividing fences up to the line and recognized it as the county line, and had so bounded their possession for twenty years prior to the trial, and that the line lately run by the processioners was a continuation of the same line. This was objected to on the ground that it was irrelevant and not binding on the defendants. The evidence admitted may not strictly fall with the rule that "Traditionary evidence [162] as to ancient boundaries and landmarks is admissible in evidence, the weight to be determined by the jury according to the source whence it comes": Civ. Code, sec. 5185. But where a public boundary, such as a county line, is the dividing line between two lots of land, use and occupancy by other neighboring land owners, whose lands are also bounded by the county line, for more than twenty years up to a certain line as the county line, erecting fences, and treating it as the county line, and the fact that such line coincides with that claimed by one of the parties, is admissible: Tyler's Law of Boundaries, 296 et seq.; Alrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Taylor v. Fomby, 116 Ala. 621, 67

Am. St. Rep. 149, 22 South. 910; Wimbish v. State, 70 Ga. 718; Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Boardman v. Reed, 6 Pet. 328, 8 L. ed. 415. This hearsay or traditionary evidence was not conclusive on the defendants as to the location of the county line, but it was admissible, and its weight was to be determined by the jury.

4. It is complained in the sixth ground of the motion for a new trial that the court charged as follows: "General reputation in the neighborhood shall be evidence as to ancient landmarks if more than seven years' standing, and acquiescence for seven years, by acts or declarations of adjoining land owners, shall establish a dividing line." The entire charge is not set up, and this seems to be an incomplete extract with some words omitted. Apparently the charge was taken from the Civil Code, section 3247, which provides that "General reputation in the neighborhood shall be evidence as to ancient landmarks of more than thirty years' standing, and acquiescence for seven years, by acts or declarations of adjoining land owners, shall establish a dividing line." This section is incorporated in the law of processioning. If the presiding judge meant to state that ancient landmarks of more than "seven" years standing were referred to in the section, it was a misquotation. The latter part of the charge also is not clear. Where lots of land are described as being bounded by a line between two counties, acquiescence for seven years by owners of some of the lands thus bounded would not be conclusive as to the true location of the lien as against others whose lands touched the line at a different point. It would be for the jury to determine, from all the evidence, where the true line was. If the location of the line was uncertain, and the parties to the controversy, or their predecessors in title, while holding it, had acquiesced by acts or declarations for seven years or more in a [163] dividing line between their lots, this would establish it as to them: Civ. Code 1895, sec. 3247; Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726; Watt v. Ganahl, 34 Ga. 290; Glover v. Wright, 82 Ga. 114, 8 S. E. 452; Catoosa Springs Co. v. Webb, 123 Ga. 33, 50 S. E. 942.

5. It is contended that the presiding judge erred in refusing a request to give in charge the following: "If the evidence showed that the title and possession of defendants was not joint, or failed to show that the acts of trespass complained of them were not committed by them jointly, then

there could be no recovery by plaintiff." It has been held by some courts that in an action of ejectment several defendants in possession, although holding separate and distinct titles, may be joined, where the plaintiff's title in relation to all is the same, and they may defend separately, each for the part in his possession: Adams on Ejectment, 4th ed., side p. 237, and note 2; Tyler on Ejectment, 445, 446, 580, 581; 15 Cyc. 83; Jackson v. Wood, 5 Johns. 278. This court announced a different rule in Wood v. McGuire, 17 Ga. 303; and the decision there made has been embodied in the Civil Code, section 5000, in the following language: "When several persons claim several parcels of land under distinct titles, and do not sustain the relation to each other of landlord and tenant, a joint action of ejectment cannot be maintained against them, nor can a joint or several recovery be had in such action, either for the premises or mesne profits." The point may be raised by demurrer if the fact appears on the face of the proceedings (Lewis v. Adams, 61 Ga. 559), or by motion for nonsuit if it first appears from the evidence. In the latter event the plaintiff may dismiss as to the improper parties: Cunningham v. Bradley, 26 Ga. 238. And it has been said that where two or more defendants are charged in the plaintiff's declaration with holding possession of the premises in dispute jointly, if it appear on the trial that each of them possesses a parcel of the land not jointly but in severalty, the plaintiff will be entitled to a verdict for one possession only, at his election: Tyler on Ejectment, 580, 581; Jackson v. Hazen, 2 Johns. 438.

The present action is neither ejectment nor complaint for land, but an equitable action seeking not only to recover land, but also to enjoin a trespass, and to recover damages for a trespass already committed. The fact that it may seek to recover land and damages, as well as to have equitable relief, does not prevent it from being an [164] equitable action: Collinsville Granite Co. v. Phillips, 123 Ga. 830, 51 S. E. 666. No demurrer was filed to it as being without equity, nor was any defense made on the ground of misjoinder of parties, and the case proceeded as such an action, including a prayer for injunction, although in fact none was granted. The common-law rule, that in a joint action all of the plaintiffs must recover or none, does not prevail in equity. In Bingham v. Kistler, 114 Ga. 453, 40 S. E. 303, it was said: "It is well settled at law that in a joint action to recover land, if it ap-

pears that one of the plaintiffs is not entitled to recover, the suit will fail as to all. But even in cases of this character, where equitable defenses are interposed, the common-courts of equity. In such a case a decree will be molded so Truelove, 66 Ga. 480; Milner v. Vandivere, 86 Ga. 540, 12 S. E. 879. Much more would such a rule not be applicable in an action which is purely equitable. The common-law rule, that all must recover or none, was never adopted by law rule above referred to will not be applied: Rumph v. as to do justice to all the parties: See Pomeroy's Remedies and Rights, sec. 209 et seq." It would seen that in an equitable action against several defendants, the rule would equally apply that a failure to recover against some would not necessarily result in a failure as to all.

6. Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. The jury may in their verdict specify the particular damages to be recovered of each, and judgment will then be entered severally. But the defendants are not entitled to have damages apportioned by the verdict. Some of the defendants may be found to be trespassers and a recovery may be had against them, while some may be found not to be trespassers: Civ. Code, sec. 3815; McCalla v. Shaw, 72 Ga. 458; Hollingsworth v. Howard, 113 Ga. 1099, 39 S. E. 465; Hay v. Collins, 118 Ga. 243, 44 S. E. 1002. Of course there cannot be a recovery for a trespass against a defendant if he is not connected with it. To recover against defendants as joint trespassers, they must be such.

On the subject of whether in a suit brought against two or more defendants as partners a recovery can be had against one, there has been some diversity in the decisions of this court, but it has been said that, even in that case, a separate verdict may be had, and if no objection be made until after verdict it comes too late: Maynard v. Ponder, 75 Ga. 664. See, also, Waldrop v. Wolff, 114 Ga. [165] 610, 40 S. E. 830. The decision in Swift v. Tatner, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842, does not conflict with the ruling here made. There an attachment was taken out against several defendants as joint owners of a ship, and it was held: "The plaintiff having failed to prove the joint ownership as alleged, and that being the foundation of liability as to certain of the defendants, and this being an attachment case, the court erred in not granting a new trial for the want of evidence to uphold

the joint verdict." Nor is there anything in the decision of Brownlee v. Abbott, 108 Ga. 761, 33 S. E. 44, in conflict with the present ruling. There also a joint verdict was rendered as to several defendants, without evidence to support it as to some of them.

As the case must be tried again, we refrain from expressing any opinion as to the evidence.

Judgment reversed.

All the justices concur, except Beck, J., not presiding.

The Question of Boundaries, with reference to evidence of their practical location through acquiescence and recognition on the part of the adjoining proprietors, together with their conclusiveness as thus established, is discussed in the monographic note to Washington Rock Co. v. Young (Utah), post, p. 666.

HODGES v. WATERS.

[124 Ga. 229, 52 S. E. 161.]

LANDLORD AND TENANT—Estoppel to Deny Landlord's Title.—One who goes into possession of land as a tenant of another is estopped to deny the title of the latter. It is sufficient between the lessor and the tenant that the former claims ownership, and, as a resul of this claim, the tenant is put in possession and allowed to occupy the premises. (pp. 166, 167.)

LANDLORD AND TENANT—Estoppel to Deny Landlord's Title.—One who goes into the possession of land as a tenant is estopped to set up title adverse to his landlord from whom he obtained possession until he has surrendered possession to him, and re-entered after such surrender under some other person. (p. 168.)

LANDLORD AND TENANT—Liability for Rent.—If a person goes into possession of land as the tenant of one person, and expressly agrees to pay rent therefor to another person for a specified time, he will be bound by his agreement, provided it is based upon a sufficient consideration, but after the expiration of the time fixed, no promise to pay further rent will be implied, and he may then deny liability for rent, although he remains in possession as the tenant of the person who placed him in possession. (pp. 168, 169.)

Brannen & Booth, for the plaintiff in error.

232 COBB, P. J. The rule that one who goes into possession of land as a tenant of another is estopped to deny the title of him who occupies the relation of landlord in the agreement is familiar law. In the application of this rule it is immaterial whether the landlord is the owner or has any legal interest in the premises. It is sufficient as between him and

his tenant that he claims ownership, and as a result of this claim the tenant is put in possession and allowed to occupy the premises: Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291. Upon the question as to whether this estoppel operates where the tenant, at the time the contract of rental is made, is already in possession through another and former landlord, or another claim of title, the authorities are at variance. In Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129, the supreme court of California held that if one in possession takes a lease from a stranger, the lessee so in possession is not estopped to deny the title of the lessor, since the latter parts with nothing, and the former has obtained nothing by the transaction. This decision seems to follow an older decision, and in both cases one of the judges dissented. The better rule seems to be that laid down by the supreme court of Colorado, in Lyon v. Washburn, 3 Colo. 201, where it is said that an attornment by one in possession estops the tenant from denying his landlord's title, unless the attornment was brought about by fraud, force, or mistake of fact. In the opinion Wells, J., says: "To avoid the assertion of a hostile title, one may lawfully contract to pay for his own; and if the threatened litigation be foreborne, he is bound by his promise; and so the tenant holding under a lord, where title is unimpeachable, may, if he will, undertake to pay rent to every stranger who demands it. Such demand implies the threat of litigation and dispossession if the demand be refused; and if made in good faith, and without fraud or other improper practice to induce concession, and if the tenant yield to it with a full understanding of all the facts [233] which are material to the question of his liability, it is difficult to see why he should not be bound by his promise, even though he should become liable thereby to pay triple rent for the same premises": See, also, Carter v. Marshall, 72 Ill. 609; Lucas v. Brooks, 85 U. S. 436, 21 L. ed. 779. In Hamilton v. Pittock, 158 Pa. St. 457, 27 Atl. 1079, an instruction that "a man may, if he sees fit, where there are conflicting titles, take a lease from each of the owners of it; and if he is not deceived by assertion in regard to the matter, he would have to pay both," was approved as sound law.

Hodges, under his admissions, was a tenant of Mrs. Waters, the contract being that he was to have the use of the place, and the rent was to be paid by furnishing her with support. It is immaterial whether Mrs. Waters had any interest in the premises as between her and Hodges. He recognized her as

his landlord, and he obtained possession from her; and as between them he cannot raise any question as to her title. By express agreement under seal, in the year 1896, as well as the year 1897, he recognized the plaintiff as his landlord, and agreed to pay him a stipulated amount as rent, the written agreement between the parties having all the formalities required to create the technical relation of landlord and tenant. So far as those years were concerned he occupied the relation of tenant to both plaintiff and his mother, and as against each he was estopped to deny this relation, certainly so far as the payment of rent was concerned. He could not defeat the claim of Mrs. Waters for rent by showing that the agreement between her and her son was invalid for any reason; neither could he defeat the claim of her son for the rent of those years by showing that the title of the mother was superior. Having received possession of the land from Mrs. Waters, he could not by any act of his place himself in a position where as against her he could deny her title. So long as the possession thus acquired continued he was estopped from denying her title as landlord. To deny her title it was necessary for him to surrender to her that possession which he had received from her, and re-enter after such surrender under some other person. Therefore an agreement to pay rent from year to year would arise between Hodges and Mrs. Waters until there had been an actual surrender of the property to her. Hodges' possession having been in no way dependent upon any act of the plaintiff, to what extent the agreement between him and the plaintiff would create a liability for rent of the premises would depend upon the terms of the agreement. If Hodges, upon sufficient consideration, agreed to pay the plaintiff rent for 1896 and 1897, he would be bound by this agreement and must pay the rent. But after the expiration of the term fixed in the agreement, his obligation to pay rent depending upon the agreement alone, and his possession not having been obtained through the person to whom the promise was made, there would be no obligation upon him to attempt a vain and idle thing, that is to surrender the premises belonging to one person to another who was not entitled to it. He was not compelled at the end of the year 1897 to abandon possession of the premises which he at all times held under Mrs. Waters, in order to prevent a liability on his part to pay her son rent in the future. Not having acquired possession from her son, the estoppel raised by the

contract to pay rent was no broader in its operation than the contract provided for; and he was therefore not estopped from denying after 1897 that he was no longer liable to pay rent as a tenant to the son of Mrs. Waters. If, at the time the defendant had made the contract to pay rent to the plaintiff, the plaintiff had been in possession claiming title to the property as his own, and no other person's rights were to be affected, then his entering into a contract to pay rent would have made the defendant a tenant of the person to whom the rent was payable, and render him liable to all the incidents of such a tenancy: See Johnson v. Thrower, 117 Ga. 1007, 44 S. E. 846; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794. The defendant was liable to the plaintiff for the rent of the years 1896 and 1897, which he expressly agreeed to pay, the consideration for such promise being the quieting of his possession from the threat of eviction made by the plaintiff. The defendant having testified that he had never agreed to pay rent for any other year than those named, the judgment must be reversed upon that assignment of error which complains that the court erred in charging the jury that if at any time the defendant had recognized the plaintiff as his landlord, he could never thereafter be heard to deny his obligation to pay rent so long as he remained in possession of the premises.

Judgment reversed.

All the justices concur.

The Estoppel of a Tenant to Deny his landlord's title is the subject of an extended note to Davis v. Williams, 89 Am. St. Rep. 62-115.

CENTRAL OF GEORGIA RAILWAY COMPANY v. HALL.

[124 Ga. 322, 52 S. E. 679.]

CARRIERS—Right to Limit Liability.—A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold; but by special contract he may relieve himself of his common-law liability as an insurer, and from liability arising from losses which do not involve his negligence or that of his servants. He cannot, however, even by special contract, exempt himself from liability for goods intrusted to him and lost through his negligence or that of his servants. (pp. 171, 172.)

CARRIERS — Livestock.—A common carrier of goods who transports livestock is, as to the latter property, also a common carrier. (p. 172.)

CARRIERS OF LIVESTOCK may, by Special Contract, so limit their liability for loss or damage that they will be liable only in the event that they are guilty of gross negligence. (p. 172.)

CARRIERS—Limitation of Value.—A common carrier may make a valid contract of affreightment with a shipper embracing an actual and bona fide agreement as to the value of the property to be transported, and may thus limit his liability for loss to the amount agreed upon, but a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an arbitrary preadjustment of the measure of damges, will not, though the shipper assents thereto in writing, serve to exempt the carrier from liability for the true value of the property shipped and lost or damaged through his negligence. (p. 173.)

CARRIERS—Limitation of Value—Construction of Contract.—When an issue of fact arises from the terms of a contract of affreightment as to whether there was an actual and bona fide valuation fixed on the property shipped, or whether there was simply an effort to limit liability arbitrarily, the question is one for the jury, but when the contract shows on its face that it arbitrarily limits the liability, there is no issue of fact, and it is for the court to construe the contract. (p. 175.)

CARRIERS — Negligence—Insanity—Act of God.—If an engineer in charge of an engine drawing a railroad train suddenly becomes insane and negligently runs his engine at such an excessive rate of speed as to result in wrecking one of the cars and causing the loss of property being transported, such insanity is not an act of God to which the loss can be attributed so as to excuse the carrier from liability. (p. 181.)

CARRIERS—Act of God—Burden of Proof.—In order for a common carrier to avail himself of the act of God as an excuse for liability, the burden of proof is upon him to establish not only that the act of God ultimately caused the loss, but that his own negligence did not contribute thereto. (p. 181.)

PRINCIPAL AND AGENT—Insanity of Agent.—For the insanity of the agent to excuse his principal for an act done within the scope of his authority, such insanity must have been so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. (p. 184.)

CARRIERS OF LIVESTOCK—Insanity of Engineer—Burden of Proof.—If a common carrier is transporting livestock under a special contract limiting its liability for loss to fraud or gross negligence, it is a good defense that the engineer upon the train carrying such stock suddenly became insane without the knowledge of the carrier, and that his acts while so insane caused the loss, but the burden of proof is upon the carrier to show not only such insanity on the part of its engineer, but also that it or its other agents were not chargeable with gross negligence contributing to the loss. (p. 184.)

TRIAL—Amendment of Pleading—Insanity as Defense—Comment of Counsel.—While an amendment to a pleading when allowed relates back to the time of the filing the original pleading, it is nevertheless legitimate for counsel to comment on the occurrences during the trial, including the setting up of the defense of insanity, which was not originally referred to in the original pleading filed two years before the amendment. (p. 185.)

DAMAGES—Measure of Interest.—If, for damages arising from the destruction of property, there is a basis of calculation as to the value, interest is not recoverable eo nomine. The jury may, however, consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may in their discretion increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value, the entire sum found being returned as damages, and not exceeding the sum sued for. (p. 185.)

N. E. and W. A. Harris, for the plaintiff in error.

S. H. Sibley, for the defendant in error.

[324] LUMPKIN, J. 1-3. In cases of loss the presumption of law is against a common carrier, and no excuse avails him unless it was occasioned by the act of God, or the public enemies of the state. "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby": Civil Code, secs. 2264, 2276. Construing these two sections together, the latter does not permit a common carrier to relieve himself of the duty of exercising diligence; but by special contract to relieve himself of his common-law liability as an insurer, and to contract against liability arising from certain losses which do not involve negligence of the carrier or his servants. The requirement of diligence on the part of a common carrier is one involving public policy, and it would be contrary to such policy to allow him to relieve himself from his duty in this regard by contract. A common carrier cannot, therefore, by special contract exempt himself from liability for loss of goods intrusted to him, where the loss arises from his own negligence: Berry v. Cooper, [325] 28 Ga. 543; Purcell v. South-

ern Express Co., 34 Ga. 315; Southern Express Co. v. Purcell, 37 Ga. 103, 92 Am. Dec. 53; Western etc. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Georgia R. Co. v. Gann, 68 Ga. 350; Central R. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750. In Savannah etc. Ry. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219, it was said that the question as to how far a shipper might, by express agreement signed by him, contract against liability on the part of a common carrier for injuries arising from negligence, was still an open question. But in the next case reported in the same volume it was said: "But carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence": Georgia R. etc. Co. v. Keener, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287. The carrier referred to was a common carrier. See, also, Wood v. Southern Express Co., 95 Ga. 451, 22 S. E. 535; Central of Georgia Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720. This ruling is not dependent upon our statute, but accords with the decisions of other courts, though it is not universally so held: 6 Cyc. 387, 388.

A common carrier of goods which transports livestock is as to the latter property also a common carrier: Hutchinson on Carriers, 2d ed., sec. 221; 5 Am. & Eng. of Law, 2d ed., 428. It has nevertheless been held that a carrier of livestock may by special contract so limit its liability for loss or damage that it will be liable only in the event that it is guilty of gross negligence: Cooper v. Raleigh etc. R. Co., 110 Ga. 659, 36 S. E. 240; Georgia R. R. v. Spears, 66 Ga. 485, 42 Am. Dec. 81; Central R. v. Bryant, 73 Ga. 722; Cincinnati Ry. v. Disbrow, 76 Ga. 253. If it were an original question, it might well be argued that it is somewhat anomalous to hold that such a carrier is a common carrier of livestock, that extraordinary diligence is required of it (now so declared in the statutes of this state), and that it is contrary to public policy to allow a common carrier to contract against liability resulting from its own negligence, and yet to say that in regard to livestock it may contract against such liability except as to gross negligence: See 6 Cyc. 391, 392; New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; East Tennessee etc. R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489. But the ruling seems to be established in this state. Perhaps the difference between livestock and inanimate freight may furnish the basis for this holding.

In the case at bar the contract provided that the owner or shipper [326] assumed and released the railroad from "all

other damage incident to railroad transportation, which shall not have been caused by fraud or gross negligence of said company." This became the measure of the negligence which would render it liable. The presiding judge, in effect, so charged; and we do not think his charge, taken as a whole, was subject to the criticisms made upon it as to this point.

4. It was contended that under the contract the defendant was not liable for the value of the horse beyond the sum of one hundred and twenty-five dollars. Was the contract relied on by the defendant an actual bona fide agreement as to the value of the property lost, or was it a mere general limitation as to value, amounting to an arbitrary preadjustment of damages? The former would be valid; the latter not: Central of Georgia Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; Georgia R. & B. Co. v. Keener, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287; Georgia S. etc. Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807. The contract, which was included in the bill of affreightment and signed by the agent of the owner and the agent of the company, contained the following provision: "And it is further agreed that should any damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, two hundred dollars; for a horse or mule, one hundred and twenty-five dollars; cattle, forty dollars; other animals, twenty dollars." This was upon a printed blank containing these amounts already prepared. It did not purport to put a valuation upon the particular horse or horses shipped, but limited the amount to be claimed for any horse, regardless of its real or estimated value, to one hundred and twenty-five dollars. It had a prearranged amount to which its liability should be limited as to various animals. If this could be treated as a bona fide estimate or valuation as to the horse which was killed, it might equally be said to be a valuation of every possible horse which might be shipped, before it was ever seen or heard of by the company's agent. The expression "other animals twenty dollars" would thus be treated as being a bona fide valuation of any other animal, regardless of what was its nature, character, or actual value. A rabbit, a hog, or an elephant might equally fall under the designation of "other animals," and the arbitrary limitation of twenty dollars would apply equally to each of them. Moreover it will be noticed that, in case of loss, the company does

not agree that the value of the horse shall be fixed at one hundred and twenty-five dollars; but the agreement is that "the amount claimed shall not exceed" [327] that sum. This was clearly an attempt to limit the liability, not to determine value. As was said in the opinion in Central of Georgia Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720, "Could any fair and reasonable mind ever reach the conclusion that there was between the plaintiffs and the defendant any agreement at all respecting the value of this particular carload of grapes, or that there was even a remote intention to make such an agreement?"

5. Should the presiding judge have submitted the question to the jury to decide as to whether this contract amounted to an actual bona fide valuation? On its face it did not do so. Outside of the paper there was no evidence of any actual valuation of this particular horse. It, with several others, was delivered to the railroad company together with certain sulkies, which seems to have indicated that the horses were to be used otherwise than as common draft animals. Eight horses were also shipped in two cars, and an attendant went with them. No inquiry was made as to their nature or value. The company had two kinds of blanks, one for use where livestock was shipped "released," the other where it was not. An agent of the defendant asked the plaintiff's agent if he wished to ship the horses "released," and upon receiving an affirmative answer, filled one of the blanks, except as to the rate, which was filled in by the rate clerk. There is only one "release rate" for horses. The rate clerk has the classification of the state railroad commission, and fills in the rate that belongs to that agreement. A witness for the defendant testified that the rate was fixed at twenty-seven dollars per car between the points included in the transportation, "based on the valuation of one hundred and twenty-five dollars"; but he admitted that nothing was said to the shipper as to valuation. This was the entire transaction. True the shipper admitted that he knew that if he had named a higher valuation on the horses he would have had to pay a higher rate, and that if he had not shipped "released" the rate would have been much higher. But there was nothing in what transpired between the parties to show a bona fide effort to fix a value on the horse which was killed, or on any one or all of the horses. Every shipper who is asked whether he will ship "released" probably knows that if he does not do so the rate will be

higher. But this does not change an effort to limit liability into an actual valuation of property.

The construction of the contract made in this case is controlled [328] by the decisions in Georgia R. Co. v. Keener, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287; Central of Georgia Ry. Co. v. Murphey, 113 Ga. 574, 38 S. E. 970, 53 L. R. A. 720. The decision in Southern Ry. Co. v. Horner, 115 Ga. 381, 41 S. E. 649, is cited to sustain the contention that the case should have been submitted to the jury. In that case it is stated, in the report of facts, that "The testimony was in direct conflict as to the making of a special contract of shipment ; and that Lee [the defendant's agent] gave him a rate based on a valuation of one hundred dollars for the horse, and explained to him that the tariff required an addition of fifty per cent for each additional one hundred dollars of valuation." The contract contained the following terms: "The said shipper or the consignee is to pay freight thereon to the said carrier at the rate of — per —, which is the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said livestock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event. If horses or mules, not exceeding one hundred, one hundred dollars each," etc. It was held, that under the terms of this contract and the evidence introduced, an issue was made as to whether in fact there was a valuation or an arbitrary preadjustment of damages, and that this was properly submitted to the jury. The difference between submitting to the jury to determine, under the evidence, whether terms of this character inserted in a contract of affreightment constituted a bona fide and actual valuation or a mere preadjustment of damages, and, on the other hand, submitting to the jury the construction of the contract alone, which plainly on its face was not a valuation but an effort to limit damages, is clear. The case of Central of Georgia Ry. Co. v. Glascock, 117 Ga. 938, 43 S. E. 981, is also cited as authority to show that the present case should have been submitted to the jury. On a casual inspection it might appear to be so, but an examination of the record in that case shows that the contract contained language somewhat similar to that considered in the case of Southern Ry. Co. v. Horner,

115 Ga. 381, 41 S. E. 649. After stating that, if the carrier should be liable, the value at the place and date of shipment should govern the settlement, in which the amount claimed should not exceed certain specified sums, it was added, "which amounts it is agreed are as much as such animals are herein agreed to be transported are reasonably worth"; and stamped across the face of the contract was [329] the statement, "The attention of shippers has been called to the terms, conditions, values, etc., herein named." (These facts do not appear as fully in the printed report as in the record of file in this court.) This made a question for submission to the jury. In the case at bar there was nothing to show that there had been an actual valuation.

6. It was contended that the evidence in this case was sufficient to show fraud on the part of the shipper, and that the question of its existence should have been submitted to the jury. We cannot concur in this view. There is nothing to show that there was any misrepresentation, concealment or artifice which would deceive the agent or the carrier as to the nature or character of the property. It appears to have been openly shipped, and, as already mentioned, in such a way as to indicate that the horses were not mere common animals shipped in carload lots. They were open to the inspection of the agent. He took no precaution and asked no questions as to their value. He asked alone as to whether they should be shipped "released." He relied on the making of the contract, which, as to this point, was not binding under the law. The Civil Code, section 2290, reads as follows: "The carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability."

In Southern Express Co. v. Everett, 37 Ga. 688, it was held that if a shipper at the time of the delivery of the goods for shipment practices any fraudulent acts, sayings, or concealments upon the carrier as to the value of the parcel, or resorts to any artifice to give a box containing a valuable diamond breastpin a mean appearance, and thereby to induce the carrier to think it of trifling value, and so prevent him from making inquiries, this would operate as a fraud, and relieve him from liability. In Green v. Southern Express Co., 45 Ga. 305, the evidence for the defendant was to the effect that the plaintiff valued the property involved in the controversy

at one hundred dollars. He testified that he shipped a trunk, and was asked its value but failed to give it. In Savannah etc. Ry. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416, the property was shipped as a bundle of bedding, nothing being said about wearing apparel, and after loss the shipper sought to recover the value of certain wearing apparel claimed to have been wrapped up in the bedding. In Southern Express [330] Co. v. Wood, 98 Ga. 268, 25 S. E. 436, the conduct of the shipper was calculated to mislead the agent of the railroad and conceal the true character of the contents of the package delivered for transportation. In Georgia etc. Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807, the shippers sent candy to a railroad for transportation. It was in boxes, and the contents of the packages were unknown to the company. Candy could be shipped in either of two classes, having different freight rates. The shippers classified the candy as of the lower grade, and thus prepared shipping tickets, using a form containing the words, "Candy released, six cts. per pound valuation," and obtained a lower rate of freight. On this the railroad received the goods. It was held that, upon damage or loss occurring, the shippers could not recover at a higher valuation than that so fixed. In the case under consideration there was nothing to mislead the carrier or prevent its agents from making inquiries as to value.

7, 8. The defendant pleaded that its engineer in charge of its train became suddenly insane, and lost his power of mental control and discretion; that this was unknown to the defendant or any of its agents or employés until after said transaction, and could not have been known to it by the exercise of all the diligence required of it by law; and that all the acts of the engineer complained of were due to the sudden insanity which developed at the time and while the transaction was going on, unmixed with any negligence of the defendant. The plaintiff demurred to this plea, and the demurrer was overruled. The court charged, in effect, that if the engineer suddenly became insane, and thereby became demented to such an extent as to lose his reason and render him totally irresponsible for his acts, such insanity and acts growing out of it would, in a legal sense, be the act of God. To this charge the defendant excepted. The determination of the defendant's liability in the present case does not rest upon the common-law liability of common carriers as insurers, but

upon a special contract. But as the judge charged as above stated, and the question has been argued before us, the writer deems it not improper to discuss the case as it would stand at common law in the absence of a limiting contract.

Much learning and ability has been expended on the subject of what constitutes an "act of God" which will relieve a common carrier. Lord Coke made frequent use of the expression, applying it to death, sudden tempests, and the like. In Forward v. Pittard, [331] 1 Term Rep. 27-33, Lord Mansfield used the following oft-quoted language: "Now, what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests." Some courts have held that the terms "act of God," and "inevitable accident," are synonymous. But others have held that there was a distinction. For interesting discussions and illustration of acts which fall within the designation, "acts of God," see Pandorf v. Hamilton, L. R. 17 Q. B. 674; Nugent v. Smith, L. R. 1 Com. P. 423 et seq.; Hays v. Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627. In an elaborate and able note to Coggs v Bernard, 1 Smith's L. C., 8th ed., 422 et seq., the cases are reviewed, and it is said: "Upon the whole, it would seem that an act of God signifies the extraordinary violence of nature and these cases now express the more commonly recognized law—that the act of God which excuses the carrier must be a direct and violent act of nature." In these authorities are also discussed the terms, "unavoidable accident," "inevitable accident," "perils of the sea," and similar expressions frequently used in bills of affreightment: See, also, Stroud's Judicial Dictionary; Bouvier's Law Dictionary; Black's Law Dictionary; Anderson's Law Dictionary, words "Act of God," "Common Carrier," and cit.; 3 Wood's Railway Law, 1574; 2 Kent's Commentaries, 598; 5 Thompson on Negligence, 6456; Story on Bailments, 9th ed., sec. 25.

In Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, the liability of common carriers and their right of defense on the ground that the injury was occasioned by the "act of God" was considered. Nisbet, J., in the opinion used the following

language: "Unavoidable accidents are, in our opinion, the acts of God. The latter words express the same acts, and no more than the former; the two phrases mean the same thing: See Story on Bailments, secs. 25, 511; 2 Kent's Commentaries, 597. What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness: Story on Bailments, sec. 25; 2 Kent's Commentaries, [332] 597. The act of God excludes all idea of human agency: McArthur v. Sears, 21 Wend. 190. In this case it is said: 'No matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet if it be the result of human means the carrier is responsible': See, also, Backhouse v. Sneed, 1 Murph. 173; Evart v. Street, 2 Bail. 157, 23 Am. Dec. 131; Smyrl v. Niolon, 2 Bail. 421, 23 Am. Dec. 146." In Central Line v. Lowe, 50 Ga. 509, Judge McCay, delivering the opinion said: "There is, doubtless, a distinction between an 'act of God' and an 'unavoidable accident.' The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man." In Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153, Judge McDonald, delivering the opinion, said: "While every shower of rain that falls upon the earth is the act of God, in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense which protects a man against responsibility for the nonperformance of a contract like that made by this plaintiff": See, also, Cannon v. Hunt, 113 Ga. 501, 30 S. E. 983; Young v. Waldrip, 91 Ga. 765, 18 S. E. 23; Richmond etc. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Carr v. Houston Warehouse Co., 105 Ga. 268, 31 S. E. 178. In the case of McArthur v. Sears, 21 Wend. 190, which is cited as authority in the case of Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, a steamboat had been driven on shore by a previous gale; as a second steamboat later approached the harbor at night, the weather was hazy and the snow was falling. Those in charge were misled by the light of the boat on shore, and the second boat struck a shoal. It was held not to excuse the carrier.

In Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292, it is said: "By the 'act of God' is meant something which operates without any aid or interference from man. When the loss is occasioned, or is the result in any degree of human aid or interference, the case does not fall within the exceptions of the carrier's liability": See, also, New Brunswick Steamboat etc. Co. v. Tiers, 4 Zab. 697, 64 Am. Dec. 394. The maxim that "the act of God is so treated by the law as to affect no one injuriously" (Actus Dei nemini facit injuriam) has a general application, and is not limited to cases affecting common carriers: Broom's Legal Maxims, 8th ed., 229, *230. Nevertheless, in 16 American and English Encyclopedia of Law, second edition, 622, it is said: "A lunatic is not responsible for crime, because he is not a free agent, capable [333] of intelligent voluntary action, and therefore is incapable of a guilty intent; but in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the same as a sane person, except for those torts in which malice, and therefore intention, is a necessary ingredient. In respect to this liability there is no distinction between torts of nonfeasance and of misfeasance; and consequently an insane person is liable for injuries caused by his tortious negligence. Insane persons are held to this liability on the principle that where a loss must be borne by one or two innocent persons, it shall be borne by him who occasioned it. This position is sustained by a number of authorities: Cooley on Torts, 2d ed., 115, m. p. 99 et seq.; Cross v. Kent, 32 Md. 581; White v. Farley, 81 Ala. 563, 8 South. 215; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Avery v. Wilson, 20 Fed. 856; Krom v. Schoonmaker, 3 Barb. 647; Jewell v. Colby, 66 N. H. 399, 24 Atl. 902 (holding that the damages recoverable are limited to compensation for actual loss sustained by the injured party); Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Williams v. Hays, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. 449, 25 L. R. A. 695, 157 N. Y. 541, 68 Am. St. Rep. 797, 52 N. E. 589, 43 L. R. A. 253."

When the case of Williams v. Hays was first before the court of appeals of New York it was decided that "If one of several owners of a ship is in charge thereof under a contract with the others as lessee or bailee, and on his attention being called to its peril refuses to believe in such peril, though apparent, or to take any measures to avert it and thereby the ship

is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time." Earle, J., delivered a learned opinion, citing many authorities on the subject. In the course of it he made use of this expression: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with." When the case was before the court of appeals for the second time, it was held that this question should be submitted to the jury, Bartlett, J., dissenting.

Indeed, a little reflection will suffice to show that the injury in this case could not fairly be considered as arising from the act of God. For this defense to be available as an excuse to a common carrier the act of God must be the proximate cause of the loss or injury: Hutchinson on Carriers, 2d ed., secs. 179, 180, 180 (a). If insanity were to be analogized to sudden or overpowering illness [334] which renders it impossible for a person to perform an act or discharge a duty, nevertheless in this case the act of God was not the immediate or proximate cause of the loss, unaffected by human agency. If insanity be treated as an act of God, it was not insanity alone which killed the horse. The engineer, conductor and flagman were all concerned in separating the engine from the cars and leaving them apparently without light or warning signal upon the track; the engineer, the fireman and the conductor all went together to the water-tank. The engineer set the engine in motion at a rapid speed while returning to the cars. It is not pretended that he was stricken with illness or even insanity after he did this, so as to prevent his stopping the engine. But the contention is that because of unsoundness of mind he did careless or reckless acts. Suppose that, instead of having killed the horse by the collision, the engineer had stolen the horse, would it be contended that, by showing insanity on his part, the taking became the act of God? Or, if the agent of the company had made a mistake and delivered the plaintiff's horse to some other person, whereby it was lost to the plaintiff, would it be urged that, if the agent were insane, the delivery of the horse to the wrong person was an act of God? Surely not. Sudden death or sickness of such character as to render action impossible, may sometimes excuse nonaction. But tortious action does not become the act of God because the person acting may be sick.

9. There is a further reason why, under the evidence in this case, this defense could not avail the defendant. In Richmond etc. R. Co. v. White, 88 Ga. 805, 15 S. E. 802, it was said: "And generally, in order for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish, not only that the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto, for 'in cases of loss the presumption of law is against him' ": Central etc. R. R. Co. v. Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; Civ. Code, sec. 2265. Here the presiding judge charged that gross negligence took the place of negligence, in stating the rule.

10. The present case, however, does not rest on the common-law liability of common carriers. A special contract in regard to the shipment of the livestock was made which exempted the carrier from all liability incidental to railroad transportation, except for fraud or gross negligence on its part. Under such facts, does the [335] rule that a tort-feasor is not generally excused from liability for actual damages by reason of insanity apply also to an insane agent, so that the principal is liable for an injury committed by such an agent, if the latter becomes suddenly and totally insane, and the principal and his other agents are without fault? The reasoning that if the loss must be borne by one or two innocent parties, it should be borne by him who occasioned it is not to be carried to the extreme of holding that the mere fact of the occurrence of loss necessitates a recovery in all cases, regardless of whether there was negligence or any violation of legal duty. On the general subject, see Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372. This is not a case of a physical injury to the person, and does not fall within the principle of law codified in the Civil Code, section 3826, which declares as follows: "A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law. The intention should be considered in the assessment of damages." But even this was held not to create liability for a personal injury resulting from falling into an elevator shaft, in the absence of negligence of the owner: Whatley v. Block, 95 Ga. 15, 21 S. E. 985. Nor is the present action for conversion. It is a suit for damages claimed to have resulted from gross negligence.

Aside from the common-law liability of carriers, or any statutory provision, the general rule is stated in Angell and

Ames on Corporations, eleventh edition, 310, thus: "As natural persons are liable for the wrongful acts and neglects of their servants and agents, done in the course and within the scope of their employment, so are corporations, upon the same grounds, in the same manner, and to the same extent": See, also, Angell and Ames on Corporations, 11th ed., 382, 383; Morawetz on Private Corporations, secs. 725, 730. Suppose that the agent of an individual should become suddenly and wholly insane without the knowledge of the principal, would the latter be responsible for all his acts, both of omission and commission, in the absence of any wrongful act or failure of duty on his own part or that of his other agents? In such examination as I have been able to make, I have found no case which extends the doctrine of liability of a person for his own torts, regardless of his insanity, to liability of a principal for the negligent torts of an insane agent, unless the principal commanded or assented to the acts, or knew of the insanity, or he or his other [336] agents failed in some respect in their duty. In Buswell on Insanity, sections 355 and 356, the author recognizes the rule, that, "although a lunatic may not be punishable criminally, he is liable, in a civil action, for any tort he may commit." Yet he says (section 357), "It would seem that if one knowingly employs an insane person as his servant or agent, he will be liable for damages to innocent third parties resulting from acts done by the insane person in the scope of his employment." By analogy to this principle, it was held in Cole v. Nashville, 4 Sneed (Tenn.), 162. that if a municipal corporation, "knowing a person to be a lunatic, commission him by its license to follow within its limits a dangerous avocation, the exercise whereof requires great caution and circumspection, and while such person is so engaged under said license any injury be done to an individual by the act of such person in the pursuit of said business, the corporation is liable in damages to the injured party." In Christian v. Columbus & R. Ry. Co., 79 Ga. 460, 7 S. E. 216, the declaration alleged that the railroad company knowingly employed an insane agent who committed a homicide while in charge of its office. In the opinion it was said: "We think, also, that if the homicide was the result of insanity, and the railroad company was faultless in regard to employing the agent, anything that would excuse the agent criminally for the act would excuse the railroad company civilly." As it was alleged that the company employed the agent know-

ing of his insanity, the point now being considered was not directly involved; nor was this a conclusive holding that the test of criminal and civil liability is the same (see discussion in Berkner v. Dannenberg, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559); but it is cited to show that this court did not treat the principal as at all events liable for the conduct of an insane agent. Insane persons are generally declared incompetent to be agents: Story on Agency, sec. 7; 1 Am. & Eng. Ency. of Law, 2d ed., 945. The Civil Code, section 3001, says: "Any person may be appointed as an agent who is of sound mind." If a principal selects a sane agent, he takes the risk of the possible negligence or tortious conduct of such agent acting within the scope of his agency; but becoming insane is an abnormal condition, and is not ordinarily one of the risks in contemplation. Of course, if the principal knowingly appoints an insane person as his agent, or permits such a one to act for him after knowledge of the insanity, he will not be excused by reason of it.

337 We concur with the trial judge in holding that to be an excuse the insanity must be so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. So long as it is merely a partial derangement, he remains to some extent a sentient agent acting for his principal; and it would involve a maze of uncertainty to undertake to hold the principal partially liable and partially not. Indeed, Professor Wharton contends that an irresponsible man is not to be considered as a juridical cause, but rather like a weapon of wood or stone, incapable of intelligent choice, and acting only as it is employed or compelled: Wharton on Negligence, 2d ed., sec. 88. Under the law of this state, on proof of the loss a presumption of negligence arose against the railroad company, and the burden was on it to show not only the insanity of the engineer, but also that it or its other agents were not chargeable with gross negligence contributing to the injury. If they were so, the defense would fail. From a careful examination of the evidence we are of the opinion that it failed to show a sufficient defense. There was no evidence of any sudden insanity coming on the engineer in the midst of this transaction. So far as the evidence tended to show insanity at all at that time, it indicated that certain symptoms (such as irritability, moodiness at times, etc.) had been observed be-

fore the occurrence. The engineer was not discharged because he was insane, but because he was at fault. He continued to run an engine months after this transaction, and a considerable time had elapsed before a physician advised that he was insane and should be sent to the asylum. Moreover, the conductor was on the engine with him, had authority to compel him to obey orders, and spoke to him of the danger, but permitted him to proceed, when he said that he knew where the other cars were. The presiding judge submitted the issue to the jury, and they found the defendant liable.

11. Complaint is made that the court permitted counsel for the plaintiff to comment upon the fact that no defense of insanity was set up when the action was originally brought in 1902, but was brought in by way of amendment to the defendant's answer pending the trial of the case in September, 1904. While an amendment, when allowed, generally relates back to the filing of the pleading amended, it is nevertheless legitimate for counsel to comment on the [338] occurrences during the trial of the case, including the setting up of the defense of insanity which was not originally referred to in the pleadings: Inman v. State, 72 Ga. 269; McBride v. Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999.

12. The headnote sufficiently states our ruling on the subject of adding interest to the value of the property destroyed: Western etc. R. Co. v. McCauley, 68 Ga. 818; Central R. v. Sears, 66 Ga. 499; Western etc. R. Co. v. Brown, 102 Ga. 13, 29 S. E. 130. Where the damages found are discretionary or punitive, this rule does not apply: Western etc. R. Co. v. Young, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684.

A consideration of all the grounds of the motion for a new trial satisfies us that there were no errors requiring a reversal.

Judgment on the main bill of exceptions affirmed. Cross-bill dismissed.

All the justices concur, except Beck, J., not presiding.

The Limitation of Carriers' Liability in bills of lading is the subject of a monographic note to Chicago etc. R. R. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 74-134. For a recent decision discussing this question with special reference to carriers of livestock, see Nashville etc. Ry. Co. v. Stone, 112 Tenn. 348, 105 Am. St. Rep. 955.

YOUNG v. SMITH & KELLY COMPANY.

[124 Ga. 475, 52 S. E. 765.]

INDEPENDENT CONTRACTORS are not Liable for injuries to third persons occurring after such a contractor has completed the work and turned it over to the owner or employer and it has been accepted by him, though such injury resulted from the contractor's failure to properly carry out his contract. (p. 186.)

E. H. Abrahams and R. L. Colding, for the plaintiff.

O'Connor, O. Byrne & Hartridge, for the defendant.

476 FISH, C. J. The general rule is well established that an independent contractor is not liable for injuries to a third person, occurring after the contractor has completed the work and turned it over to the owner or employer and the same has been accepted by him, though the injury result from the contractor's failure to properly carry out his contract: 1 Thompson on Negligence, sec. 686; Wharton on Negligence, sec. 438 et seq.; 16 Am. & Eng. Ency. of Law, 209. There are some modifications of this rule. Among them are cases where the work is a nuisance per se, or where it is turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons: See above-cited authorities. The present case, we think, falls within the general rule. Smith & Kelly Company was an independent contractor. It had fully completed its contract for loading the vessel with prosphate rock and had turned it over to the consignees, Minis & Company. The work was not a nuisance, nor was the condition of the hatch as left by Smith & Kelly Company imminently dangerous in itself. Plaintiff, a laborer of this firm, was injured, as the petition alleged, by the negligent 477 failure of Smith & Kelly Company to perform its contract with the owners of the ship. It is clear that, under the rule above announced, the plaintiff, if he has been a servant of the owners of the vessel, would have had no cause of action against Smith & Kelly Company. As he was a servant of Minis & Company and not of the owners, the rule is equally applicable, and he had no cause of action against the defendant. Fulton County St. Ry. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828, is cited for the plaintiff in error. There a street railway company, having authority under its charter to construct a railway in a public street, had the work done by an independent contractor. An injury to a person passing

along the street was caused by the negligence of a servant of the contractor in unnecessarily and improperly laying down loose rails in advance of the workmen engaged in constructing the track. In a suit against both the railway company and the contractor, the contractor was held liable for the consequences of such negligence. The railway company was held not liable, on the ground that it had not reserved any control over the conduct of the contractor in executing the work. Counsel for the plaintiff in error also cite Ridgeway v. Downing Company, 109 Ga. 591, 34 S. E. 1028. In that case the owner of a vacant city lot, who for years had suffered the public to use a thoroughfare over the same, employed an independent contractor to construct a building thereon, according to certain specifications, including piling for the foundation. The contractor dug a trench for such purpose across the thoroughfare. It was held that the owner of the lot was not liable for a personal injury sustained by one who fell into the trench by reason of its unguarded condition. The nonliability of the owner was put upon the same ground as that announced in Fulton County St. Ry. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828, that is, that the owner had had no immediate direction and control over the work. Both of these cases were governed by the decision rendered in Atlanta etc. Ry. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277, where it was held: "Where an individual or corporation contracts with another individual or corporation exercising an independent employment, for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods and not subject to the employer's control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor [478] or of the contractor's servants." This rule is embodied in the Civil Code, section 3818, and exceptions thereto in section 3819. There is nothing in these cases in conflict with the general rule that an independent contractor is not liable for injuries to a third person, occurring after the completion of the work and its acceptance by the owner or employer, resulting from the failure of the contractor to properly carry out his contract. The petition was properly dismissed upon general demurrer, as it set forth no cause of action against the defendant.

Judgment affirmed.

All the justices concur.

The Doctrine of the Principal Case will be found discussed in the monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 409, on the liability for the negligence and torts of independent contractors.

OLIVER v. WARREN.

[124 Ga. 549, 53 S. E. 100.]

FORTHCOMING BONDS—Issues.—In a suit on a forthcoming bond given by a claimant, where its execution is not denied, the only issue to be decided is whether or not there has been a breach of the bond. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact in such suit. (p. 189.)

Z. B. Rogers, for the plaintiff.

Van Duzer & Tutt, for the defendants.

[550] EVANS, J. In the various code sections regulating the practice in a justice's court, there is no specific form of direction of an execution to any particular officer. Mesne process is directed to and served by constables: Civ. Code, sec. 4116. Final process may be executed by any officer empowered to serve mesne process, unless there is a statutory inhibition. Hence constables may levy executions from a justice's court; and, by the Civil Code, section 4381, sheriffs are also empowered to serve and execute both mesne and final process issued for justices' courts. The regular bailiff of a county court is authorized to levy only the processes of the county court: Civ. Code, sec. 4190. He has no authority to levy an execution issued from a justice's court. A levy by a county court bailiff of a justice court execution is void, because a levy by an officer without authority of law is no levy at all: Morris v. Tinker, 60 Ga. 466; Collins v. Hudson, 69 Ga. 684. It is not good as a levy by a de facto officer, because the county court bailiff, in making the levy, does not assume to act as constable or as sheriff or lawful deputy. If he did, and his appointment or qualification were irregular, nevertheless his acts would be those of a de facto officer: Twiggs v. Hardwick, 61 Ga. 272; Hinton v. Lindsay, 20 Ga. 746; Gunn v. Tackett, 67 Ga. 725. But where he undertakes to extend the jurisdiction of his office to the execution of process which under the law he has not the power to execute, quoad [551] hoc he is

a usurper of the functions of another office, and is not a de facto officer.

However, it is insisted that the defendants are estopped from denying the legality of the levy, because Warren, the principal on the bond upon which the suit was predicated, obtained possession of the property and in the bond recited the factum of the levy. It is certainly true that the filing of a claim and the giving of a forthcoming bond estops a claimant and the surety on his bond from denying the completeness and sufficiency of the seizure of the property made by the levying officer: Cohen v. Broughton, 54 Ga. 296; Scolly v. Butler, 59 Ga. 849; Connolly v. Atlantic Contracting Co., 120 Ga. 216. The estoppel does not extend to the validity of the process (Smith v. Lockett, 73 Ga. 104; Osborne v. Rice, 107 Ga. 283), nor to the authority of the officer to make the levy: Pearce v. Renfroe, 68 Ga. 194. In the present case the defendants, by signing the bond, estopped themselves from denying that the county court bailiff made an actual seizure of the property by virtue of the process in his hands: Pearce v. Renfroe, 68 Ga. 196. But on the trial of the claim case they would not have been precluded from showing that such seizure by the county court bailiff was void, because, as to the act of levy, the bailiff was not an officer, either de jure or de facto, but a mere usurper of the functions of other officers designated by law to execute this particular process. However, in a suit on a forthcoming bond, where its execution is not denied, the only issue to be decided is whether or not there has been a breach of the bond: O'Neill Mfg. Co. v. Harris, 120 Ga. 467, 47 S. E. 934. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact. As was said by Bleckley, C. J., in Anderson v. Banks, 92 Ga. 121, 18 S. E. 364: "It is not allowable for a claimant to defeat a sale by interposing a claim and then appropriate the property to his own use or suffer it to be appropriated by his surety on the claim bond, and then contest, not in the claim case—the very case appointed by law for the purpose—but in a suit on the bond, the right of the plaintiff in execution to sell the property." While a regular county court bailiff is limited to serving processes issued from the county court (Civ. Code, sec. 4190), and is without authority to levy a justice court execution, yet if he does in fact undertake to do so, and a claimant and his surety procure possession of the property seized by giving a forthcoming bond, they cannot

defeat a recovery [552] thereon by setting up the defense that the county court bailiff was not such an officer as could lawfully make the levy. The time for them to raise this point is when the claim case comes on for trial. Had the defendants in the present case urged this objection at the proper time, it is not improbable that, upon the authority of Pearce v. Renfroe, 68 Ga. 194, the levy would have been dismissed. The claimant litigated the question of title in the claim case. It was the levy which brought the claimant into court. If he was improperly brought there by means of a void levy, he should then and there have protested. After an adverse judgment in the claim case—an adjudication that, as between the defendant in fi. fa. and himself, he had no title to the property—he was no longer concerned about the authority of the levying officer to make the levy, and nothing remained for him to do except to comply with the obligation of his bond. Upon his failure so to do, he and his surety became liable thereon.

The sole question raised in the present bill of exceptions is whether or not the trial judge properly directed a verdict in favor of the defendants upon the ground that the levying officer, being a bailiff of the county court and acting in that capacity, was without authority to levy a fi. fa. issuing from a justice's court. As will have been seen, the defendants were precluded from raising any such objection in a suit upon the bond, and the direction of a verdict in their favor was erroneous. It may not be improper to add that even had the trial judge been correct in his ruling, he should not have directed a verdict in favor of the defendants; for, as pointed out in Barnes v. Carter, 120 Ga. 895, 48 S. E. 387, if a plaintiff fails to make out a prima facie case, a verdict for the opposite side should not be directed, but a judgment of nonsuit should be entered.

Judgment reversed.

All the justices concur.

The Only Defense that ordinarily can be made to an action on a forthcoming bond is performance. The defendant cannot set up property in himself as a defense: Nagle v. Stroh, 4 Watts, 124, 28 Am. Dec. 695. A forthcoming bond cannot be avoided by showing that there was no original judgment to sustain the execution: Bank of United States v. Patton, 5 How. 200, 35 Am. Dec. 428. So, in an action on an undertaking in attachment, the parties are estopped to question the regularity of the attachment: Brown v. Tidrick, 14 S. Dak. 249, 86 Am. St. Rep. 754.

SOUTHERN RAILWAY COMPANY v. GRIZZLE.

[124 Ga. 735, 53 S. E. 244.]

PRINCIPAL AND AGENT—Agent's Personal Liability for Act of Misfeasance.—If an agent fails to use reasonable care or diligence in the performance of his duty, he is personally responsible to a third person who is injured by such misfeasance, not as an agent but as a wrongdoer. (pp. 191, 192.)

RAILROADS—Liability of Engineer.—The act of a railroad engineer in running his train over a public crossing in violation of statutory requirements as to the giving of signals is an act of misfeasance, rendering him individually liable to a third person injured by such act. (pp. 192, 193.)

RAILROADS—Act of Misfeasance by Engineer—Joint Liability.—A railroad company and its engineer are jointly liable when the sole ground of liability is a negligent act of misfeasance on the part of such engineer. (p. 193.)

RAILROADS—Foreign—Place of Suit—Residence.—A foreign railroad company operating within a state under whose laws it is a resident and its engineer are jointly liable for the tortious act of the latter, and may be jointly sued in the county where such act was committed, although the residence of such engineer is in another county in the state. (p. 195.)

REMOVAL OF CASES.—If a complaint states a good joint cause of action against a foreign railroad company and its engineer, who is a resident of the state, and a recovery is sought solely on the ground that such engineer negligently and wrongfully failed to comply with the requirements of the statute, other averments in the complaint made as mere matter of inducement, and not as ground for a recovery, do not make a separable controversy between the railroad company and the plaintiff so as to authorize an order of court removing the case to a national court. (p. 195.)

J. J. Strickland and S. J. Winn, for the plaintiff in error.

Atkinson & Born, for the defendant in error.

737 COBB, P. J. 1. An agent is not ordinarily liable to third persons for mere nonfeasance: Kimbrough v. Boswell, 119 Ga. 201, 45 S. E. 977. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeas-

ance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf: See 2 Clark & Skyles on Agency, 1297 et seq. Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the [738] rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation: Mechem on Agency, sec. 572. As was said by Gray, C. J., in Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437: "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." In that case the agent was held liable by the fall of a tackle-block and chains from an iron rail suspended from the ceiling of a room, which fell for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In Bel v. Josselyn, 3 Gray, 309, 63 Am. Dec. 741, Metcalf, J., said: "Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do. The defendant's omission to exam-

ine the state of the pipes, ... before causing the water to be let on, was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff."

In the present case the failure of the engineer to comply with the requirements of the blow-post law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf of the principal to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of [739] misfeasance. This view is strengthened by the fact that the blow-post law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him.

2. The engineer may be sued, and the railway company is also liable to suit, on account of his conduct. Can the engineer and the railway company be jointly sued when the sole ground of the liability of the railway company is the act of the engineer himself? While the case of Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989, is not identical with this case in its facts, it is controlling in principle. In that case the railway company and a passenger were sued jointly for an assault upon another passenger, in which the conductor took part. The liability of the railway company resulted solely from the act of the conductor. It was held that the railway company and the passenger who participated with the conductor in the assault could be jointly sued. It is unnecessary to add anything to the reasoning in that case. It is conclusive upon the question now before us.

3. Suits against foreign railroad companies for causes of action originating in this state must be brought in the county where the cause of action originated, if the company has an agent in that county. If the foreign corporation is operating under a domestic franchise and there is no agent in the county where the cause of action originated, suit may be brought in

the county of the residence of the company owning the franchise. But if it is not operating under a domestic franchise, it has no residence in this state, within the meaning of the Civil Code, section 2334. If an action against such a company is instituted in this state, it must be brought in the county where the cause of action originated, without reference to whether there is an agent in that county or not: Hazlehurst v. Seaboard Air-Line Ry., 118 Ga. 858, 45 S. E. 703; Coakley v. Southern Ry. Co., 120 Ga. 960, 48 S. E. 372. The petition alleges distinctly that the cause of action arose in the county of Gwinnett, and that the company has an agent in that county. A suit against the company alone would therefore have to be brought in that county. A suit against O'Neal alone would have to be brought in the county of Fulton. The constitution declares that suits against joint trespassers residing in different counties may be tried in either county: Civ. Code, [740] sec. 5872. Here we have a joint liability. O'Neal resides in Fulton county. The question is whether the Southern Railway Company has such a residence in Gwinnett county that a joint suit may be maintained in that county against it and O'Neal, who is a nonresident of the county. The determination of this question depends upon whether under the laws of this state the Southern Railway Company is a resident of Gwinnett county within the meaning of the constitutional provision above referred to. "The constitution in fixing the venue of suits against joint defendants was intended to be exhaustive, and not to leave a hiatus in which the right to bring a single suit against joint defendants might be lost because of the want of jurisdiction to apply the remedy": Cox v. Strickland, 120 Ga. 104, 47 S. E. 912. If the Southern Railway Company does not reside in Gwinnett county within the meaning of this section of the constitution, then the railway company and O'Neal cannot be jointly sued in that county. Neither can they be jointly sued in Fulton county; for the jurisdiction depends not only upon the residence of one of the defendants in the county where suit is brought, but also upon the residence of the other defendant in another county in this state, the constitution declaring that "joint trespassers residing in different counties" may be sued in either county. The Southern Railway Company is engaged in doing business in this state, and has agents located here for that purpose, and it is, so far as the right to sue it is concerned, a resident of the state: Reeves v. Southern Ry. Co.,

121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513. It has a residence in Gwinnett county so far as the right to bring a suit against it for a cause of action originating in that county is concerned. Within the true intent and spirit of the constitutional provision, it therefore resides in Gwinnett county. So residing, it may be sued there alone on a cause of action originating in that county, or it may be there sued jointly with other wrongdoers, who are also residents of this state in other counties.

4. O'Neal being a resident of this state, the right to remove the case to the circuit court of the United States depends upon whether there is a separable controversy between the railway company and the plaintiff. It is claimed that there is. It is said that the railway company had located two warehouses within two feet of the tracks, and that the warehouses obstructed the sound of approaching trains, and likewise the view, and that this was an act of negligence [741] on the part of the railway company, in which O'Neal did not at all participate, and this act of negligence made a separable controversy between the plaintiff and the railway company, independently of O'Neal's act in failing to comply with the blow-post law. We cannot concur in this view. We do not think that the petition, properly construed, alleges that the manner in which the warehouses were constructed and located was an act of negligence on the part of the railway company. It is nowhere in the declaration distinctly alleged as an act of negligence. It is in that part which deals with the question of the exercise of proper care and diligence on the part of the plaintiff's husband, and gives a reason why he was not negligent in approaching the crossing. The location of the warehouses and the effect of the warehouses in obstructing the sound and view of an approaching train were alleged merely by way of inducement, and not as a ground of recovery. Construing the petition as a whole, the plaintiff seeks to recover alone upon the negligence of the railway company and engineer on account of the failure to comply with the requirements of the blow-post law. Since this case was argued, the supreme court of the United States, on January 2, 1906, in the case of Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. Rep. 161, rendered a decision on the right of removal in a case similar in many respects to the one now under consideration. We have had before us a certified copy of the opinion which was prepared by Mr. Justice Day. While the court seems to have left open the question as to whether it

would hold that a suit against a railway company and an engineer upon facts similar to those in the present case was properly brought as a joint cause of action, still it was distinctly held that, in determining the question of removal to the circuit court of the United States, the cause of action must be deemed joint if the pleader in the state court has made it joint; and that there would then be no separable controversy between the railway company and the plaintiff which would authorize a removal of the case to the federal court: See, also, Cincinnati etc. Ry. Co. v. Bohon, 200 U. S. 221, 26 Sup. Ct. Rep. 166. The petition in the present case clearly sets forth a joint cause of action. We have reached the conclusion that under the facts alleged there was a joint cause of action. It is clear, therefore, that the case was not removable, if we have construed the [742] petition properly as to the location of the warehouses. We do not think there was any error in refusing to pass an order of removal.

Judgment affirmed.

All the justices concur.

All Authorities agree that an agent is personally liable to third persons for injuries resulting from his misfeasance: See the note to Baird v. Shipman, 22 Am. St. Rep. 514. In fact, master and servant are jointly liable as joint tort-feasors for a tort of the servant committed within the scope of his employment, whether the master is present or not: Schumpert v. Southern Ry. Co., 65 S. C. 332, 95 Am. St. Rep. 802; Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250; Gates v. Latta, 117 N. C. 189, 53 Am. St. Rep. 584. Master and servant may be joined in one action to recover compensation for injuries suffered from the same act of negligence: Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 48 Am. St. Rep. 911.

POPE v. STATE.

[124 Ga. 801, 53 S. E. 384.]

CRIMINAL LAW—Venue—Division of County.—A criminal case involving an offense committed in the territory of a new county, which was pending in a court of the old county at the time that the new one was created by dividing the old cannot be properly tried in the court of the old county, and the defendant has a right to demand that he be tried in the new county in which the crime was committed, and by proper proceeding he is entitled to have the case transferred to that county for trial. (p. 206.)

Whipple & McKenzie, for the plaintiff in error.

F. A. Hooper, solicitor general, and E. F. Strozier, for the state.

802 COBB, J. P. Pope was tried on December 5, 1905, in the city court of Vienna upon an accusation charging him with assault and battery. The accused filed a plea to the jurisdiction, upon the ground that the alleged offense was committed on June 8, 1905, in the tenth district of Dooly county, that Crisp county was created on August 17, 1905, and organized on November 22, 1905, and that the tenth district of Dooly county thereafter became a part of Crisp county, and that therefore the city court of Vienna, which had jurisdiction only of offenses committed in Dooly county, had no jurisdiction over the alleged offense. The plea further alleged that the accused resided in Crisp county. He also entered a plea of not guilty. The allegations of the plea to the jurisdiction were admitted to be true by counsel for the state. The accused moved for a judgment of not guilty, and for a dismissal of the case. The motions were overruled; and the accused was convicted. To these rulings he excepted.

From 1777 until 1877 the General Assembly was authorized to lay out new counties whenever in its judgment it was necessary for the public welfare. The power to lay out new counties was expressly recognized in the earlier constitutions of the state, and was never taken away by any of the later constitutions until 1877. The last exercise of this power prior to the adoption of the present constitution was the creation of the county of Oconee in 1875, just two years before the convention assembled which declared that no new counties should thereafter be created. In 1904 the constitution was so amended as to authorize the creation of eight additional coun-

ties. The General Assembly in 1905, exercising the power granted to it, [803] created the number of counties authorized by the amendment. As the power of the General Assembly to create new counties existed for one hundred years, it would seem that there would be many cases involving questions arising out of the creation of new counties, but there are few in number. Less than ten have been called to our attention, and these seem to be all that are contained in the reports of this court. The first case arising out of the creation of the eight new counties above referred to is now before us for consideration, and involves the question as to the venue of a criminal case pending at the time that the new county was created, when the offense was committed in the territory embraced in the limits of the new county.

The provisions of the constitution fixing the venue in all cases both civil and criminal was intended to be exhaustive. It is therein declared that divorce cases shall be brought in the county where the defendant resides, if a resident of this state; if the defendant be not a resident of this state, then in the county where the plaintiff resides; that suits against the maker and indorser of a promissory note, or drawer, acceptor, or indorser of a foreign or inland bill of exchange, or like instrument, residing in different counties, shall be brought in the county where the maker or acceptor resides: Civ. Code, secs. 5869-5873. It is to be noted that in the provisions just referred to the constitution fixes the venue by the use of the words "shall be brought." The constitution declares that cases respecting titles to land shall be tried in the county where the land lies. Equity cases shall be tried in the county where the defendant resides against whom substantial relief is prayed. Suits against joint obligors, etc., may be tried in either county, and all other civil suits shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed, except where the judge is satisfied an impartial jury cannot be obtained: Civ. Code, secs. 5870-5874.

The county of Crisp was created by an act approved August 17, 1905. It provided that the first election for county officers should be held on the first Wednesday in October, 1905. There is nothing in the act relating to cases pending in the courts of Dooly county, from which the new county was carved: Acts 1905, p. 52. An August 21, 1905, an act was approved providing for the organization of new counties:

Acts 1905, p. 46. The only provision in [804] that act relating to pending cases is the first section of the act, which is in the following language: "When a new county is organized, the jurisdiction of all suits pending in the county or counties from which said new county has been laid off, of which, under the constitution and laws of this state, the new county shall have cognizance, is transferred immediately to the corresponding courts in said new county, and the jurisdiction of suits then pending in the county or city courts of the old counties is conferred upon the superior court of said new county, together with all the court papers pertaining thereto, to which shall be attached the certificate of the clerk of the court from whose office they came that they are the proper papers of the suit, and the amount of cost accrued therein, and the amount then due; and on the final disposition of said transferred cases, it is hereby made the duty of the clerk of the court, or, in the case of no clerk, of the presiding justice, to collect the costs due the officers of court in the county from which said case was transferred, and to account to such officer for all costs collected by them; and in event of their failure to account for such costs to the officers of the court from which said cases were transferred, they are hereby made liable to attachment for contempt." A provision somewhat similar to this is found in the Code of 1863, section 31, and in subsequent codes, but was omitted from the Code of 1895 for the obvious reason that at the time that code was adopted there was no power in the General Assembly to create new counties.

The term "suit" cannot, without serious strain, be construed to include a criminal case. The act is therefore silent in regard to the status of criminal cases involving offenses committed in the territory of the new county, which were pending in the old county at the time the new county was created. While the act provides for the transfer of civil cases, an investigation of the authorities as to the effect of the creation of a new county upon such cases may throw some light upon the status of a pending criminal case. When an act providing for the creation of a new county provides for the future election of county officers, the territory embraced within the limits of the new county does not become a county until the organization of the new county is perfected. As was said by Sanderson, J., in People v. McGuire, 32 Cal. 140: "In constituting a county something more is required than defining its boundaries. A local government must be provided, and

the creation of a county is not [805] accomplished until both these things have been done in the appointed mode. To hold otherwise would lead to very absurd consequences." And see 7 Am. & Eng. Ency. of Law, 2d ed., 923. In Perkins v. Patten, 10 Ga. 241, a suit was commenced against two defendants residing at the time in Marion county, and before trial and judgment the new county of Macon was created, embracing that portion of the territory of Marion in which the defendants resided. There was no provision in the act for the transfer of suits pending from the old to the new county. It was held that by operation of law, under the provisions of the constitution the new county was the proper county for the trial of the case, that being the county in which the defendants resided, and that the judgment rendered in the new county was a good and valid judgment. In that case Judge Warner said: "By the new organization of the counties, the defendant resided in Macon county, without any change of his location. By operation of law he becomes a citizen of the county of Macon, and is bound, with his neighbors, to perform all his civil duties in that county. His neighbors perform jury duty in the courts of the new county, and not in the old; so that if his legal rights are to be determined by a jury from the vicinage, the trial must be had in the new county. But, in our judgment, the constitution settles the question, that the trial of the cause was properly had in the new county of Macon, for the reason that was the county wherein he resided. If the constitution did not give the right to have the cause tried there, an enactment of the legislature transferring the cause from the old to the new county could not confer it. The jurisdiction for the trial of the cause is fixed by the constitution to be in the county wherein the defendant resides. The suit was properly commenced in Marion county, as the defendant resided there at that time, but the new county of Macon being organized, in which the defendants resided, the suit was necessarily transferred, by operation of law, from the county of Marion to the new county of Macon for trial, in accordance with the provisions of the constitution."

In Murdock v. Little, 18 Ga. 719, a recovery in ejectment was had in Crawford county, and at a subsequent term a motion was made to set aside the judgment and execution issued thereon, because no process was annexed to the declaration. Pending this motion the land in dispute was cut off into Taylor county and it [806] was held not error for all the record in

the case to be transferred to Taylor county. Judge Lumpkin, in the concluding sentence of the opinion, says: "At any rate, as the proceeding is yet incomplete, it would seem to be more symmetrical, and more in conformity to the spirit of our constitution, that further litigation springing out of the ejectment should be conducted in the county where the land lies." In McBain v. Wimbish, 27 Ga. 259, a will was propounded for probate in Sumter county, in which the testator had resided at the time of his death. A caveat was entered and an appeal taken by consent to the superior court. At this stage of the case a division of the county took place, and the record in this case, with that of others, was transferred to Schley county. When the case came on for trial in Schley county a motion was made that the case be returned to the superior court of Sumter county, and the court declined to grant this motion. It was held by this court that the motion was properly overruled. There was nothing in the act creating the new county which controlled the matter, nor was there any general law on the subject; but it was nevertheless held that the case was properly transferred to the new county. In Knight v. Knight, 27 Ga. 633, the testator died in Henry county. His will was probated and admitted to record in that county. An application was then made to revoke the letters testamentary on account of the birth of a posthumous child unprovided for. In the meantime that part of Henry county including the testator's residence at the time of his death was cut off into Spalding. It was held that Henry county had jurisdiction of the proceeding, and that the right to transfer to Spalding county was a personal privilege. It was said by Judge Lumpkin: "This right to transfer is a question of privilege, rather than of constitutional law. And may be waived by the party. And all done, up to that time, will be adjudged to be recte acta." And Judge Benning, in a concurring opinion, said, that while it was doubtful if the act of the legislature, "cutting off the part of Henry and making it a part of Spalding, did per se deprive the court in Henry of jurisdiction," the effect of the act was at least "to give to any of the parties interested in the estate the privilege to have the case transferred to Spalding." Judge McDonald dissented, but filed no dissenting opinion. In McDougald v. Maitland, 30 Ga. 703, it was held that where a case is to be transferred from an old to a new county, and the papers are
807 lost, copies should be established in the old county before

the transfer of the case is ordered. In Kelly v. Tate, 43 Ga. 535, an action of ejectment was brought in Sumter county, and, while the case was pending, a change in the county line was made by which the land in controversy was made a part of Macon county. It was held that the act changing the county line deprived the superior court of Sumter county of jurisdiction of the case, and that the process of that court should not have been enforced, and a judgment refusing to grant an injunction restraining its enforcement was reversed. Mr. Chief Justice Lochrane, in the opinion, said: "For after the act of the legislature changed the territorial limits of the county, and the land, the subject of the suit, fell within a different county, the court was deprived of all jurisdiction over the subject matter of the litigation, and, upon these facts being shown, ought to have granted the injunction sought." The case of Brown v. Bleckley, 26 Ga. 328, did not involve the question of venue at all, but simply the lien of the officers of the old county upon fines and forfeitures realized in the new county upon cases transferred from the old county. In Smith v. Dees, 92 Ga. 549, 17 S. E. 925, the question of venue was not involved, but whether the right of the county to tax was lost by an erroneous acquiescence of nearly forty years in which the land was not embraced within the limits of the county. The foregoing embrace all of the cases that we have been able to find in the reports of this court, relating to the venue of civil cases pending at the time of the creation of a new county, or the change of a county line.

We will now call attention to some of the rulings made by the courts of other states. In Security L. & T. Co. v. Kauffman, 108 Cal. 214, 41 Pac. 467, it was held that a suit to foreclose a lien on land was triable in the old county, notwithstanding the fact that the land upon which the lien was claimed was embraced within the limits of a new county since the suit was begun. Particular emphasis was laid upon the fact that the constitution of that state required only that such cases should be "commenced" within the county in which the land was situated, and did not require that the action should be tried in that county. In Spalding v. Kelly, 66 Mich. 693, 33 N. W. 803, it was held that the legislature had authority to provide that a pending ejectment suit should be tried in the old county, and not in the new county which embraced the [808] premises in controversy. It does not appear that there was any constitutional provision requiring suits in-

vovling titles to land to be tried in the county where the land was situated. In McNew v. Williams (Ky.), 36 S. W. 687, it was held that the fact that a new county was formed and courts established therein did not authorize the courts of the county where the action was pending to transfer it to the new county because the parties resided or the subject matter was located in the new county. It does not appear that there was any constitutional provision requiring the trial of actions in the county where the party resided or the subject matter was located. In Bookwalter v. Conrad, 15 Mont. 464, 39 Pac. 573, 581, an action concerning land was commenced in a county in which the land was then situated, and before the appearance of defendant a new county was formed out of that part which embraced the land in controversy. The constitution simply declared that actions concerning land should be commenced in the county in which the land was situated, but there was a statute which provided that such actions should be tried in the county where the land was situated. It was held that the defendant was entitled to have the case transferred to the proper court of the new county, if he applied for such transfer at the time of his appearance. In Cornell University v. Wisconsin C. R. Co., 49 Wis. 158, 5 N. W. 32, it was held that when ejectment was brought in a named county for lands then situated therein, the subsequent inclusion of the land in another county by an act of the legislature did not devest the jurisdiction of the court of the first county, in the absence of a provision in the act to that effect. It does not appear that there was any provision in the constitution of Wisconsin regulating the trial of actions. There is a ruling to the same effect in Blake v. Freeman, 13 Me. 130. See, also, Miller v. Kent, 60 Ind. 226; Tolman v. Smith, 85 Cal. 280, 24 Pac. 743; and see, in this connection, 48 Century Digest, title "Venue," secs. 11, 69. It may be deduced from these decisions that where there is no constitutional provision regulating the place at which the trial of a civil action shall be had, the cutting off into a new county of land involved in pending suits in the old county, or the change of residence of defendants against whom suits are pending, will not oust the jurisdiction of the courts of the old county, and, in the absence of a provision for the transfer of such cases to the new county, that they are triable in the courts of the
809 old county; but where there is a constitutional provision that cases respecting land shall be tried in the county where

the land is situated, and that cases against defendants shall be tried in the county where the defendant resides, the defendants in the latter character of cases, or either party in the former class of cases, may have such cases transferred for trial to the proper courts of the new county. However, if a timely motion for a transfer is not made and the case is actually tried without objection, as between the parties it would seem that an estoppel would arise to prevent them from questioning the jurisdiction of the court after judgment: See Tolman v. Smith, 83 Cal. 280, 24 Pac. 743. In a preceding part of this opinion we have called attention to the fact that the constitution of this state simply requires that certain actions shall be brought in a given county, and that certain other actions shall be tried in a given county. The act of 1905 providing for the organization of new counties simply provides for the transfer of pending suits of which, under the constitution and laws of this state, the new county shall have cognizance. It may be that a proper construction of this act would have the effect to transfer only those cases which the constitution declares should be tried in the county where the defendant resides, or where the land is situated, etc., and would not have the effect to transfer those cases where the constitution simply declares that the cases shall be brought in the county where the defendant resides. As has been seen, the constitution declares that criminal cases shall be tried in the county where the offense was committed. The effect of the creation of a new county upon the venue of a criminal case has been the subject of only one adjudication in this state. In Jordan v. State, 22 Ga. 545, it was held, when a new county was formed from an old one, and an offense had been committed in the old county prior to the division in territory subsequently embraced in the new county, that the accused should be indicted in the new county, and that an indictment by the grand jury of the new county was good, when it charged that the offense was committed in that portion of the old county which was taken to form the new county. In the opinion Judge McDonald said: "The constitution fixed the place of trial, for the benefit of the defendant or parties accused, in the county where the offense was committed, as the locality at which he could most conveniently secure the attendance of witnesses. The change in the [810] name of a county cannot operate to his detriment in any way, nor can the change of a county line." In State v. Donaldson, 3 Heisk.

(Tenn.) 48, it was held that if a county is divided and a portion of its territory goes into the formation of a new county, a criminal act done before its division in the ceded territory can be prosecuted only in the new county, and the indictment may, as to the place, aver the offense to be committed in a new county: See, also, State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483; State v. Bunker, 38 Kan. 737; McElroy v. State, 13 Ark. 708; State v. Jackson, 39 Me. 291, 17 Pac. 651; Murrah v. State, 51 Miss. 675; People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; State v. Fish, 4 Ired. 219; State v. Hart, 4 Ired. 222; 7 Am. & Eng. Ency. of Law, 2d ed., 924; 12 Cyc. 241; 14 Century Digest, tit. "Criminal Law," sec. 231.

The constitution of the state, in fixing the venue of criminal cases, recognizes the political division of the state into counties, and fixes the place of trial as that particular subdivision in which the crime was committed. The accused is entitled not only to a jury of the vicinage, but he is also entitled to the convenience resulting from a trial where the witnesses are more than apt to reside. The county where the crime is committed is, in the meaning of the constitution, that political subdivision of the state, styled county, which embraces the place where the crime was committed. The General Assembly can no more deprive the defendant of this right by the creation of a new county than it can by the change of a county line. The fact that the case is pending against him at the time that the new county is created does not deprive him of the right to demand that he be tried in the county in which the crime was committed, although the county, as such, was not in existence at the time the offense was perpetrated. What the constitution guarantees is a trial in the county where the offense was committed, not the beginning of a prosecution in that county. We will not at this time go to the extent of holding that the creation of the new county absolutely deprives the courts of the old county of jurisdiction of criminal cases pending therein, where the offense was committed in the territory embraced in the new county; for it may be that if the accused went to trial in the old county without objection, or if he made an express waiver of his right to insist upon a transfer to the new county, a judgment in the old county would be conclusive both upon him and the state. Upon this question we now [811] express no opinion. What we hold is that the accused, if he sees fit

to insist upon it, is entitled to be tried in the new county, and when he raises an objection to the jurisdiction of the courts of the old county by a timely plea, or in any other proper way, he is entitled to have the case transferred to the new county for trial. At the time that the accused was arraigned in the city court of Vienna the organization of the county of Crisp had been completed. The county officers had been elected and were discharging the duties of their office, and the courts of that county were open and discharging the functions that the law imposed upon them. In other words, Crisp county had become one of the organized counties of this state, and its courts had jurisdiction of all offenses committed in the territory embraced within its limits, whether the offense was committed before the county was organized, or after that date. The defendant, under the constitution, was entitled to be tried in a court of competent jurisdiction in that county. Upon the filing of the plea, the facts therein averred having been admitted to be true by the solicitor, the trial of the case should have been suspended and an order passed transmitting all of the papers in the case to the superior court of Crisp county for trial, there being no city court in that county. Whether the case should be tried in the superior court of Crisp county, or transferred to the county court, is a question to be decided when the case reaches the superior court of Crisp county.

Judgment reversed.

All the justices concur.

The Question of Jurisdiction, both in civil and in criminal cases, where a county is divided, is discussed in the note to Moss v. Shear, 85 Am. Dec. 101-103. A criminal prosecution may be commenced and prosecuted, after the division of a county, in the new county, if the crime was therein committed, though before such division. This remains true, although a prosecution was pending for the same crime in the courts of the late county, if such prosecution was afterward dismissed, and at the time of trial and conviction the only proceeding pending is in the new county: People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102.

GARMANY v. LAWTON.

[124 Ga. 876, 53 S. E. 669.]

CORPORATIONS—Mortgage Executed by Officer Alone.—If an officer in a corporation is intrusted by it with the performance of the entire functions of the corporation, such as are usually performed by a board of directors, it being entirely inactive, and this has become a settled policy, his act in executing a mortgage on its personal property in its name and behalf, acquiesced in by all of the directors and stockholders, is binding against the corporation and its subsequent creditor, who obtained a lien by suing out a distress warrant for rent accruing long after the making and recording of the mortgage and with full knowledge of it. (p. 211.)

CORPORATIONS—Parol Evidence of Transactions.—If it appears that a corporation has kept no minute-books, stock-book, corporate seal, or record of its transactions, parol evidence of such transactions is admissible as against the objection that the books are the best evidence. (p. 212.)

MORTGAGES—Evidence of Renewal Note.—If a mortgage is given to secure a note, and it is provided in the instrument that the payee agrees to renew it from time to time, evidence is admissible to show that a note bearing a later date is a renewal of that first given. (pp. 212, 213.)

MORTGAGES—Receivership Litigation—Liability for Costs.—If a mortgagee is made a defendant in an action seeking to place the property of the mortgagor in the hands of a receiver, and is involuntarily, by injunction, prevented from foreclosing his mortgage, and does no more than contest the appointment of a receiver, he is not liable for the costs and expenses of the proceeding, but if he comes in and makes himself a party complainant, and sets forth the fact of his mortgage and voluntarily litigates with the other creditors, he thereby recognizes the necessity for the petition and ratifies the filing of it, and thus becomes chargeable with his proportion of the expenses of the suit. (pp. 213, 214.)

Gordon & Elliott, for the plaintiffs in error.

Adams & Adams, for the defendant in error.

877 LUMPKIN, J. This case was by agreement tried before the presiding judge without a jury. He filed an opinion from which the following summary of facts is taken: "The Savannah District Messenger and Delivery Company was incorporated April 9, 1896, the capital stock being ten thousand dollars, with the right to increase the capital stock to an amount not exceeding fifty thousand dollars, in the discretion of the board of directors. This is the only reference to a board of directors. The charter gives the right to mortgage the property of the corporation at any time. The original incorporators conveyed by deed the property and franchises of the corpora-

tion to C. H. Medlock and H. S. Jaudon on November 11, 1898. No certificates of stock had been issued at this time. There was never any stock issued to J. B. Floyd. On July 26, 1902, two certificates of stock were issued, one for fifty shares to H. S. Jaudon, the other for fifty shares to C. H. Medlock. Jaudon, Medlock, and L. W. Walker were the directors. Walker never owned any stock. He was a nominal director. Walker moved away from Savannah, and no director was elected to fill his place. In July, 1899, Jaudon moved away from Savannah, and, until the time he sold out to Medlock all his interest in the company, he received reports from a bookkeeper concerning the business done by the company. After negotiating for two or three months, Jaudon agreed to sell out all his interest in the company to C. H. Medlock. The sale was consummated on May 8, 1903. On July 26, 1902, C. H. Medlock, to secure his individual indebtedness to I. D. LaRoche, made a deed, to secure a $878 debt, to fifty shares of the capital stock of the Savannah District Messenger and Delivery Company. This was an individual transaction, and is not contended to be a corporate liability. On May 2, 1903, C. H. Medlock, as superintendent and manager, to secure the payment of a promissory note payable to the Citizens' Bank of Savannah, due ninety days after date, for the sum of fifteen hundred dollars, sold [conveyed] to John Lawton all the property, charter and franchises, goodwill, books, and accounts of the Savannah District Messenger and Delivery Company. This mortgage was signed, 'Savannah District Messenger and Delivery Company, by C. H. Medlock, Superintendent and Manager,' in the presence of three witnesses, one of whom was a notary public. The mortgage was not filed for record until September 26, 1901, and was recorded in the office of the clerk of the superior court of Chatham county on the same day. On September 24, 1904, C. H. Medlock suddenly died. On September 27, 1904, W. B. Stubbs was appointed and qualified as temporary administrator upon Medlock's estate, and conducted the business of the aforesaid corporation until October 6, 1904, when he presented a petition to the judge of the superior court of Chatham county, asking for the appointment of a receiver to preserve and administer the assets of the corporation for the benefit of creditors. The judge signed the order before 10 o'clock A. M., October 6, 1904, appointing the receiver and restraining the said LaRoche

and Lawton, and Horace Rivers, as agent for Janie M. Garmany, their agents and attorneys, and the sheriff and his deputies, from interfering with said corporation or its assets, in any way whatever, and from levying or attempting to levy any process thereon. Service of this order was acknowledged on October 6, 1904, by Adams & Adams, attorneys for said Lawton, and by Gordon & Elliott as attorneys for said Rivers, as agent. The legal evidence shows: There was no stock-book, there was no stock issued prior to that issued to C. H. Medlock and H. S. Jaudon, there was no minute-book kept, there was no corporate seal, and no record of any corporate action; from the time Jaudon and Medlock purchased the business Medlock conducted, as manager, all the business of the corporation; and this was especially true after Jaudon removed from Savannah, and entirely true after Medlock purchased Jaudon's stock in the corporation. The evidence shows that Rivers, as agent, and his attorneys knew of the contents of the [879] mortgage to Lawton before he sued out his distress warrant. There is no evidence to show whether the levy of the distress warrant was made before or after the receiver actually took charge."

1. A corporation is a legal entity, distinguished from any or all of its stockholders. That one person may own a majority of all of the stock of the corporation does not establish an identity between him and it, so as to make acts by him in his individual name its acts and binding on it: Newton Mfg. Co. v. White, 42 Ga. 148; Exchange Bank v. Macon Construction Co., 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800; Sparks v. Dunbar, 102 Ga. 129, 29 S. E. 295; Waycross Air-Line R. Co. v. Offerman R. Co., 109 Ga. 827, 35 S. E. 275. "When a corporation in a given matter is empowered to act only through its board of directors, or other select body of its officials, individual or separate action of the members of such board is not sufficient. The agent of the corporation is the board itself acting in its organized capacity, and not its members acting independently of its meetings": Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176; Branch v. Augusta Glass Works, 95 Ga. 573, 23 S. E. 128, England v. Dearborn, 141 Mass. 590, 6 N. E. 837; Mitchell v. Rome R. Co., 1 Ga. 574. Agents must observe all the formalities required by the charter: Dobbins v. Etowah Mfg. etc. Co., 75 Ga. 243. The power of an agent to sign notes for his prin-

cipal must be given in express terms or be necessarily implied from the nature of the agency actually created: Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316. In Maine a by-law providing for a regular meeting of a board of directors has been held merely directory: Sampson v. Bowdoinham Steam Mill Corp., 36 Me. 78. While the rules above stated are correct as general rules, and an agent cannot bind a corporation by executing a mortgage on its property without its authority, unless it ratifies the act, yet the fact that the authority to make a chattel mortgage is not conferred by a formal vote at a regular meeting will not in all cases render it void; especially where there has been a practice on the part of the company to transact business otherwise: 1 Jones on Chattel Mortgages, 4th ed., sec. 51; Pingrey on Chattel Mortgages, sec. 106; 1 Cobbey on Chattel Mortgages, sec. 431; Kraft v. Freeman etc. Pub. Assn., 87 N. Y. 628. Where a corporation loosely [880] committed all its business affairs to a superintendent or general manager, and by a settled course of business he acted for it in all matters, including buying and selling property, and all of the directors and stockholders, with full knowledge of this, held no meetings and took no action, but acquiesced for a considerable length of time in his exercise of authority, if he borrowed money for the company and gave a chattel mortgage on its property, and no objection was made thereto, but his action was acquiesced in, authority to execute a mortgage might be inferred, or, if not original authority, ratification, as against the corporation or its stockholders who so acquiesced: See, on this subject, 10 Cyc. 1200; Martin v. Niagara Falls Co., 44 Hun, 130; Estes v. German Nat. Bank, 62 Ark. 7, 34 S. W. 85; Spangler v. Butterfield, 6 Colo. 356; Bank of Middlebury v. Rutland R. Co., 30 Vt. 159; Wood v. Corry Waterworks Co., 44 Fed. 146, 12 L. R. A. 168; Foot v. Rutland etc. R. Co., 32 Vt. 633; Longmont Supply D. Co. v. Coffman, 11 Colo. 551, 19 Pac. 508; Poole v. West Point Assn., 30 Fed. 513. Some of these authorities are not in accord with the case of Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176, but they are cited to show the trend of adjudication in the direction of holding that while action on the part of directors or stockholders may not be performed in the regular and proper method, nevertheless where an officer is intrusted with the performance of the entire functions of the corporation, and this has become a settled policy, his act

in executing a mortgage, acquiesced in by all the directors and stockholders, will be held binding. This is especially true in equity. Judge Thompson, in his article on "Corporations," in the Cyclopedia of Law and Procedure, says: "Where the shareholders of a corporation by their direct act or acquiescence invest the executive officers of the company with the powers and functions of the board of directors as a continuous and permanent arrangement, the board being entirely inactive, and the officers discharging all its duties, a mortgage on the property of the corporation, made and executed in its behalf by such officers, is valid, although not authorized by any vote of the shareholders or directors. But in the absence of circumstances of assent and acquiescence such as may afford circumstantial or presumptive evidence of a precedent authorization, then, on principles already discussed, the directors can give a valid authorization of so important a measure as the mortgage of the property of the corporation, only when acting and consulting together [881] as a board, duly assembled": 10 Cyc. 1199; Cunningham v. German Ins. Bank, 41 C. C. A. 609, 101 Fed. 977; Palmer v. Toms, 96 Wis. 367, 71 N. W. 654; Miller v. Matthews, 87 Md. 464, 40 Atl. 176. This affords a reconciliation between what might otherwise seem to be conflicting authority, the general rule being laid down in the latter part of the quotation, and the exceptional cases in the first part of it. In the present case the board of directors and the stockholders held no meetings and were entirely inactive, devolving the whole management of the affairs of the company upon Medlock. And this was not a casual or occasional state of affairs, but was continuous and permanent. Medlock was negotiating with Jaudon, the president, for his stock, and took a formal transfer of it shortly after the mortgage was executed. La Roche, who held the stock issued to Medlock as security, is not complaining. And as one witness expressed it, Medlock was "the lock, stock and barrel of the concern,—he was the whole thing." Or, as another witness expressed it, "he practically did all the running." Apparently he had exercised the entire functions of the corporation, including buying and selling property. After his purchase of Jaudon's stock, he renewed the note in the name of the corporation more than once. Under this condition of affairs, we think that the mortgage should be held good as against the corporation, and also as against a subsequent creditor who obtained a lien, if at all, by suing out a

distress warrant after the record of the mortgage and with full knowledge of such mortgage. The rent accrued long after the making of the mortgage. Indeed, the landlord's lien arose only upon the levy of the distress warrant: Civ. Code, sec. 3125. And the evidence leaves it in doubt as to when the levy was made, relatively to the time when the restraining order was passed. The judge of the superior court did not err in holding that the lien of the mortgage was superior to that of the distress warrant: See 10 Cyc. 1196; Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143, 20 S. E. 366.

2. Objection was made to the admission of certain evidence in regard to the corporation and its acts, on the ground that the books were the best evidence. It appears, however, from the evidence, that no minute-books or stock-books were found, either by the temporary administrator, the receiver, or the purchaser, from the receiver. The temporary administrator did testify that he found a sheet of paper which contained a memorandum purporting to be [882] the minutes of some meeting, that it was a small piece of paper, hardly a full sheet, written in pencil, and that he thought the piece of paper was among the papers in his office, but could not find it. In another part of the testimony he said that one Chaplain, representing Mrs. Medlock, came to his office, and he handed to Chaplain some personal effects, "some things that were taken out of Mr. Medlock's pocket; and I think I handed him that piece of paper, but I am not sure. I cannot say that I took it to the office. Mr. Chaplain is dead." The court did not err in holding that a sufficient foundation had been laid, and in admitting parol evidence in regard to the transactions of the company, the sole objection to the testimony being that the books were the best evidence. The case was submitted to the presiding judge without a jury, to decide both upon the law and the facts, and he found that there was no stock-book, no minute-book kept, no corporate seal, and no record of any corporate action. Nor was there error in admitting the mortgage of Lawton in evidence. If it had been executed under the common seal of the corporation, a presumption of authority would have arisen. But the absence of a seal was not fatal to it, under the facts already discussed.

3. Where a mortgage was given to secure a note, and it was provided in the instrument that the payee of the note

had agreed to renew it from time to time, it was admissible to show that a note bearing a later date was a renewal of that first given.

4. It was error to admit evidence of Lawton in regard to transactions with Medlock, who was deceased and whose administrator was a party to the case. He was not competent as a witness even to testify to the delivery of the mortgage to him. But evidence so admitted was not, under the facts of the case, of sufficient materiality to require a reversal. The mortgage in fact was recorded and in Lawton's possession with the note. It purported to be signed by the corporation through Medlock as superintendent and general manager. If his evidence had been rejected, we do not think it would have changed the result. The presiding judge added, after his signature to the bill of exceptions, a note in which he said that most of the evidence referred to was in fact rejected. But the statements in the bill of exceptions already certified cannot be changed by a note following the certificate.

Letters are the best evidence of their own contents. But the [883] evidence admitted here to the effect that Medlock had written to Jaudon about buying and selling some goods, was not sufficiently material, in view of all the evidence, to require a new trial.

5. Only one material error was committed. Lawton was made a party defendant to the equitable petition filed by Stubbs, administrator, and injunction was prayed to prevent his proceeding to levy on the property under a foreclosure of his mortgage. A temporary restraining order was granted, and the next day he voluntarily applied for and obtained a consent order directing the receiver to sell the property and pay into court the fund arising, any liens on the property being preserved on the fund, and the mortgaged property being sold separately. His application was based on the ground that the business could not be properly conducted, and that the security for his debt was deteriorating in value and was of such a nature that there was great expense connected with the keeping of it. He afterward filed an "answer and intervention," in which he alleged that the amount arising from the sale of the mortgaged property was one thousand and fifty dollars, and that, "after applying the proceeds received from the sale of the said mortgaged property, there would still be an indebtedness due the said Lawton in the sum of $———, and that he was entitled to share pro rata on

this indebtedness with the other creditors in the amount remaining from the sale of said property." Where a mortgagee is made a defendant in an action seeking to place the property of the mortgagor in the hands of a receiver, and is involuntarily prevented from foreclosing his mortgage, and does no more than contest the appointment of a receiver, he is not liable for the costs or expenses of the proceeding. In Bradford v. Cooledge, 103 Ga. 753, 30 S. E. 579, it was held that merely calling the court's attention to the lien did not render the mortgagee liable for costs or expenses, especially where the plaintiffs attacked the mortgage by amendment and made the mortgagee a party defendant. If the mortgagee comes in and makes himself a party complainant, and sets forth the fact of his mortgage, and voluntarily litigates with the other creditors, he thereby recognizes the necessity for the petition and ratifies the filing of it; and thus becomes chargeable with his proportion of the expenses of the suit: Lowry Banking Co. v. Abbott, 87 Ga. 134, 13 S. E. 204; Lewis v. Edwards, 92 Ga. 533, 17 S. E. 920; Central Trust Co. v. Thurman, 94 Ga. 735, 20 S. E. 141; Bradford v. Cooledge, 103 Ga. 753, 30 S. E. 579. When the defendant Lawton applied to the court and [884] obtained an order for a sale of the property through the instrumentality of the receiver, and afterward filed an answer and intervention, praying not only to have the amount arising from the sale of the mortgaged property paid to him, but also to share in any other funds in the hands of the receiver, he voluntarily recognized the necessity for a receiver, and used the equitable method of securing payment. He therefore became liable for his pro rata share of the costs. This error, however, does not require the grant of a new trial; but it is directed that the presiding judge so modify his decree as to charge the mortgagee with his proper share of the costs and expenses, to be determined by the ratio between the amount realized from the sale of the mortgaged property and the total amount on hand for distribution, not including the stock sold as the individual property of Medlock. It does not affirmatively appear that any of such funds arose from operating the business. No other error requiring correction appears in the record.

Judgment affirmed with direction.

All the justices concur, except Atkinson, J., who did not preside.

A Corporation is Bound by the Acts of an Officer, if it allows him to so conduct himself as to induce those dealing with him in good faith to believe he possesses certain powers, the same as though the authority were expressly granted: Kocher v. Supreme Council, 65 N. J. L. 649, 86 Am. St. Rep. 687; Jones v. Williams, 139 Mo. 1, 61 Am. St. Rep. 436; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902.

If the Directors of a Corporation for a Long Time fail to exercise their functions in directing corporate affairs, and leave them wholly to be looked after by the president, his authority to do the things he is apparently authorized to do is as binding upon the corporation as though conferred in the most formal manner: St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 964.

ATLANTA, KNOXVILLE AND NORTHERN RAILWAY COMPANY v. McKINNEY.

[124 Ga. 929, 53 S. E. 701.]

COVENANTS Running with Land—Covenant to Supply Water.—If the purchaser of water rights upon land covenants with his vendor to carry and convey sufficient water to the residence of the latter for the ample use and accommodation of such residence and its occupants, such covenant runs with the land and binds the successor in title of the covenantor. (p. 217.)

COVENANTS—Persons Bound.—If lands were conveyed by indenture to a person who does not sign the deed, but who enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in such deed. (p. 219.)

COVENANTS—Construction.—Covenants are to be so construed as to carry into effect the intention of the parties as collected from the whole instrument, and from the circumstances surrounding its execution. (p. 219.)

DEEDS—Seal.—A seal is not an essential requisite of a deed. (p. 220.)

COVENANTS—Seal.—A written instrument creating and containing a covenant need not be under seal. (p. 221.)

COVENANTS—Statute of Limitations.—Upon a covenant running with the land, contained in a deed not signed by the covenantor, the statute of limitations begins to run from the time of its breach, and an action therefor is barred at the end of six years thereafter. (p. 222.)

On November 12, 1888, the defendant in error, McKinney, was the owner and had the exclusive right to the use and control of all the springs of water and their branches on a certain lot of land for the purpose of being used on an adjacent lot. On that day he conveyed to the Marietta and North Georgia Railway Company the right to the use of such water for the purpose of supplying its water-tank, "in consideration of the fact that said railroad company shall carry and convey sufficient water to the residence of said McKinney for the

ample use and accommodation of said residence and its occupants." The Atlanta, Knoxville and Northern Railway Company, the plaintiff in error, purchased all the property, rights, and franchises of the Marietta and North Georgia Railway Company, at a receiver's sale, and failed and refused to furnish the McKinney residence with any water, although using the water for its own use. Hence this suit.

Clay & Blair and W. Butt, for the plaintiff in error.

J. Z. Foster, T. A. Brown, and DuPree & Dobbs, for the defendant in error.

[931] COBB, P. J. The right of action of the petitioner depends upon whether or not the covenant to convey water to his residence is a covenant running with the land. If it is a real covenant, he may recover for its breach against the assignee of the covenantor. If it is only a collateral or personal covenant, he has no cause of action. The determination of a question of this character is usually one of some difficulty. "All covenants are either real or personal. Those so closely connected with the realty that their benefit or burden passes with the realty are construed to be covenants real; all others are personal": 11 Cyc. 1052. "Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied": 11 Cyc. 1081. "Covenants, in order to run with the land, must, however, relate to the interest or estate, so that their performance or nonperformance will affect the quality, value, or mode of enjoyment of the estate": 8 Am. & Eng. Ency. of Law, 139. These definitions are founded directly upon Spencer's Case, 5 Coke, 16, 1 Smith's Leading Cases, ninth edition, 174, or upon authorities derived therefrom. The rule as there laid down is as follows: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land and shall bind the assignee although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time the demise is made, it cannot be appurtenant [932] or annexed to the thing which hath no being." In the case of

Atlanta Con. St. Ry. Co. v. Jackson, 108 Ga. 634, 34 S. E. 184, Mr. Chief Justice Simmons said: "To constitute a covenant running with the land, the covenant 'must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed': 1 Ballard on Real Property, sec. 491. In 2 Kerr on Real Property, section 1218. it is said: 'Of the covenants in a lease some run with the land, while others are binding only upon the person. In order that it may run with the land, its performance or nonperformance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be privity between the contracting parties.'"

In the present case the thing demised was the right to the use of water from springs and branches upon a certain lot of land for the purpose of supplying a water-tank. The covenant, the breach of which is alleged, was the agreement to convey a part of the water to the residence of the plaintiff. Under the rules above laid down, we think it is clear that this is a covenant running with the land. It measures up to every test suggested. It not only relates to the interest or estate conveyed; it is inseparably annexed to and a part of it, a charge upon it. It affects the nature, quality and value of the thing demised. It qualifies its mode of enjoyment; it restricts its use. It is inextricably woven into the manner in which the grantee shall enjoy the thing demised. "A covenant by a lessor to supply houses with water at a rate therein mentioned for each house also runs with the land, and for a breach of it the assignee of the lessee may maintain an action against the reversioner": 1 Taylor on Landlord and Tenant, 330, citing Jourdain v. Wilson, 4 Barn. & Adol. 266. See generally, upon covenants, the following authorities: Notes to Gibson v. Holden, 56 Am. Rep. 151; notes to Geiszler v. De Graaf, 82 Am. St. Rep. 664; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Winfield v. Henning, 21 N. J. Eq. 188; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Gilmer v. Mobile etc. Ry. Co., 79 Ala. 569, 58 Am. Rep. 623; Perkins Mfg. Co. v. Williams, 98 Ga. 388, 25 S. E. 556; Georgia South. Ry. v. Reeves, 64 Ga. 492; Howard Mfg. Co. v. Water Lot Co., 53 Ga. 689. In the case of Cooke v. Chilcott, L. R. 3 Ch. D. 694, it is said: "A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, 933 who retained land adjoining intended to be disposed of

for building sites, to erect pump and reservoir, and to supply water from the well to all houses built on the vendor's land. Held, that both the benefit and burden of the covenant ran with the land, and that the case was not within the second resolution of Spencer's case": See, also, Shaber v. St. Paul Water Co., 30 Minn. 179, 14 N. W. 874.

The second rule in Spencer's Case is stated: "But when the covenant extends to a thing which is not in being at the time the demise is made, it cannot be appurtenant or annexed to the thing which hath no being"; and this rule was urged as a sufficient reason for holding that the covenant in the present case was not one running with the land. This rule has been severely criticised by various courts of this country and of England: See American notes to Spencer's Case, 1 Smith's Leading Cases, 9th ed., 186 et seq.; Aikin v. Albany etc. R. Co., 26 Barb. (N. Y.) 289; Masury v. Southworth, 9 Ohio St. 340; Willcox v. Kehoe, 124 Ga. 484, 52 S. E. 896. But in the present case the facts did not make out a covenant extending to a thing not in esse. The demise is of the right to convey water from certain springs and branches to a water-tank. The covenant is to convey a part of such water to the plaintiff's residence. The covenant extends to the water to be conveyed to the plaintiff's residence. The water is the subject matter of the covenant. The manner of conveying it is not even specified. The fact that the machinery for so conveying the water was not in existence does not bring the covenant within the second rule of Spencer's Case. There is an element of futurity in every covenant; a covenant is a promise to do. The manner of its performance is of course contemporaneous with its performance, and it is immaterial whether the means upon which the manner of its performance is dependent be or be not in existence at the time the covenant is made.

Another objection urged against the alleged covenant was that the deed of conveyance was a unilateral contract, and that no undertaking of the grantee in the deed, the covenantor in the present case, could be construed to be more than a simple contract, as he neither signed nor sealed the instrument. Unquestionably, in some jurisdictions, this would be a good objection. It has been held that the mere acceptance of a deed poll will not bind the grantee therein as a covenantor: See 8 Am. & Eng. Ency. of Law, 65; contra, 11 Cyc.

1045. But this question is not open in this state, [934] this court having adopted the rule stated in Taylor on Landlord and Tenant, section 245. "It [a covenant] can only be created by deed, but may be by a deed poll [the party named in the deed] as well as by indenture; but where lands are conveyed by indenture to a person who does not seal the deed, yet if he enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it": Georgia South. R. R. v. Reeves, 64 Ga. 492.

Another contention of the defendant was that the language of the instrument should not be construed as a covenant to supply to the plaintiff's residence water derived from the water rights conveyed to the defendant, but that under the instrument the defendant might supply water from any locality whatever. If this construction were correct, the covenant would undoubtedly be collateral, personal and independent of the land; but we do not think it a fair construction of the deed. "Covenants are to be so construed as to carry into effect the intention of the parties, which is to be collected from the whole instrument and from the circumstances surrounding its execution": 11 Cyc. 1051; Peden v. Chicago Ry. Co., 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424. The covenant in question reads: "The said M. McKinney, for and in consideration of the fact that said Marietta and North Georgia Railway Company shall carry and convey sufficient water to the residence of the said McKinney for the ample use and accommodation of said residence and its occupants, then and in that event the said M. McKinney hereby grants, sells and conveys unto said Marietta and North Georgia Railway Company the right to the free and unrestricted use of water for the supplying of the railroad water-tank at Blue Ridge, in said county, with ample and sufficient water for their use from all the springs and branches for the use of said company," etc. It seems to us apparent that it was the intention of the parties that the water conveyed to the plaintiff's residence should be from the springs and branches which were the subject matter of the agreement. The grantor reserves what might be said to be the first lien upon the water, and it is only after the needs of his residence are satisfied that the defendant is given the unrestricted use of the branches and springs. It would be unreasonable to hold that the intention of the parties expressed in this in-

strument was that the water furnished to the plaintiff was to be derived from another locality, and conveyed by separate machinery to the plaintiff's residence.

935 The instrument containing the covenant recites that it is given under the hand and seal of the grantor, and it is properly witnessed, but after the signature there appears no seal, neither a scrawl nor the usual "(L. S.)." It was contended that the instrument was not a sealed instrument, and that no covenant could arise except under seal. Some device must follow the signature, which is intended as a seal, to constitute the instrument a sealed instrument: Ridley v. Hightower, 112 Ga. 476, 37 S. E. 733. Can a covenant be created in this state by a writing not under seal? The requisites of a deed in this state are declared by the code to be as follows: "A deed to lands in this state must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser or some one for him, and be made on a valuable or good consideration. The consideration of a deed may be always inquired into when the principles of justice require it": Civ. Code, sec. 3599. Seals are a relic of that period when men, as a rule, could not write. For a historical treatise upon seals, see the learned opinion of Mr. Chief Justice Lumpkin in the case of Lowe v. Morris, 13 Ga. 147. When signatures became common acquirements, a seal was supposed to import a solemnity to the act of signing and a deliberation upon the contents of the instrument. The law still maintains this fiction in many instances, notably in the application of statutes of limitation. As a matter of fact, what is commonly used as a seal in Georgia is a printed word, or the letters "L. S.," which are already upon the blank form of instrument. Hence we have the anomaly of an instrument sealed before its provisions are written, or even known, and the supposed solemnity attendant upon the signing vanishes, as does the serious deliberation upon its contents. But the custom of sealing was so firmly fixed in the common law that we have inherited the superstition of its necessity. This finds expression in many opinions where it has been said, but always as obiter, that signing, sealing and delivery are necessary elements in a deed. In no case in the reports of this court, so far as the writer has been able to find, has it been held, where the point was raised, that a seal is necessary to the validity of a deed: See, in this connection, Vizard v. Moody, 119 Ga. 918, 47 S. E. 348. In the absence of such a

holding, we think the section of the code quoted above is controlling, and that no seal is necessary to convey an estate or interest in lands in Georgia. It follows that if a deed is valid in the absence of a seal, [936] a covenant not under seal is binding as a covenant. "An express covenant can only be created by deed, which, in order to affect the validity of the covenant, must itself be valid and binding": 11 Cyc. 1044.

The demurrer also raises the objection that the action was barred by the statute of limitations. To determine this question it is necessary to ascertain when the cause of action arose. And this depends upon when the covenant was broken. A right of action for the breach of a covenant accrues at the time of the breach, which may be, but is not always, the time of the execution of the instrument containing the covenant. In the case of covenants of title which are broken as soon as made, if broken at all, the right of action accrues immediately upon the execution of the instrument containing the covenant. When the covenant runs with the land, the right of action accrues at the breach, whether that occur at the time of the execution of the instrument or subsequently: 11 Cyc. 1134. The covenant in the present case was to supply the residence of the plaintiff with water from the water supply referred to in the instrument. It was not a covenant to erect appliances necessary for that purpose. If so, there would have been a breach of the covenant after the lapse of a reasonable time for the erection of suitable appliances, and the statute would have begun to run from that date. But the covenant was to supply the water from day to day and from year to year. It was a continuing covenant. After the lapse of a reasonable time for the covenantor to provide suitable means for conveying the water to the residence of the plaintiff, an obligation arose on the part of the covenantor to supply the water. Its failure to do so was a breach of the covenant. The plaintiff's right of action would accrue from day to day and year to year, as long as the failure continued, and the fact that a portion of the claim of the plaintiff would be barred by the statute of limitations would not prevent him from recovering for that part which had not become barred at the time suit was filed. In Shaber v. St. Paul Water Co., 30 Minn. 179, 14 N. W. 874, Berry, J., in dealing with a case involving a covenant similar to the one under consideration, said: "These are therefore continuing covenants, and for that reason, and because they run with the land, the damages from their

breach accrue to him who holds the property when the breach occurs—or, in other words, to the person injured—and to him the right of action therefore necessarily [937] belongs: Jeter v. Glenn, 9 Rich. 374. In this respect they are analogous to covenants for quiet enjoyment and warranty, which inure to the protection of the owner for the time being of the estate which they are intended to insure: Rawle on Covenants, 352."

It now becomes necessary to determine what statute of limitations would bar the right of action. The instrument creating the covenant not being under seal, the period of limitations applicable to specialties, twenty years, would not apply. The only other provisions of the statute of limitations that could possibly be applicable are the ones which relate to simple contracts in writing, fixing the period of limitations at six years, or the one fixing the limitation for an action upon a breach of a contract not under the hand of a party, or upon an implied assumpsit or undertaking, at four years: Civ. Code, secs. 3767, 3768. The limitation of four years is applicable to a cause of action arising out of a transaction where there are no writings. In the present case there is a writing, but it is not under the hand of the person sought to be charged, nor of its predecessor in title. But it is a contract in writing and the defendant is bound by its terms. It is more nearly analogous to a simple contract in writing than it is to a verbal undertaking. The period of limitation would be six years, instead of four. The judge properly overruled the demurrer, because the petition set out a cause of action. But upon a trial the plaintiff will not be allowed to recover for a breach extending for more than six years before the filing of his suit.

Judgment affirmed.

All the justices concur.

A Covenant to Supply or Furnish Water for use on the premises runs with the land: See the monographic note to Geiszler v. De Graaf, 82 Am. St. Rep. 684, on what covenants run with the land.

CASES

IN THE

SUPREME COURT

OF

ILLINOIS.

PEOPLE v. KAVANAGH.

[220 Ill. 49, 77 N. E. 107.]

ATTORNEYS—Contempt—Suspension from Practice.—Where a judge sentences an attorney to jail for contempt committed before him, he exhausts his power to punish for that particular offense, and cannot, after the attorney is released on bail in habeas corpus proceedings, arbitrarily suspend him from practice in that court until the contempt is atoned for or the judgment of conviction satisfied or set aside. (p. 224.)

ATTORNEYS—Cause and Manner of Suspension.—The right of an attorney to practice law is a right of which he cannot be deprived by the courts except for legal cause, and then only in the manner pointed out by law. (p. 225.)

MANDAMUS to Enforce Attorney's Right to Practice.—Mandamus lies to compel a judge to recognize the right of an attorney to practice in the court presided over by him. (p. 225.)

C. S. Beattie, pro se.

Marcus A. Kavanagh, pro se.

[49] HAND, J. This is an original proceeding commenced in this court by Charles Stuart Beattie, a duly licensed attorney of this court, against the Honorable Marcus A. Kavanagh, one of the judges of the superior court of Cook county, for a writ of mandamus to coerce the said Marcus A. Kavanagh, as judge of the said superior court, to allow and permit said [50] petitioner to exercise all the rights and privileges of an attorney at law in the branch of the superior court presided over by said Marcus A. Kavanagh as judge. An answer to the petition was filed and a demurrer interposed to the answer.

It appears from the pleadings that on the nineteenth day of April, 1905, the petitioner, as attorney at law, appeared for one of the parties in a suit pending in the superior court of

said county which was on hearing before Marcus A. Kavanagh, the presiding judge in a branch of said court; that the conduct of the petitioner at that time in the presence of the court was such that he was then and there adjudged by the court to be in contempt of court and was sentenced by the court to imprisonment in the county jail of Cook county; that on the same day the petitioner sued out a writ of habeas corpus before the Honorable Murray F Tuley, a judge of the circuit court of said Cook county, to obtain his discharge from said imprisonment, and that the petitioner was admitted to bail by said circuit judge pending a hearing of said habeas corpus proceeding; that subsequent to the suing out of said writ of habeas corpus, the petitioner appeared on two or more occasions in the branch of the superior court presided over by said Marcus A. Kavanagh, as the attorney of parties having suits pending in said court; that the said judge refused to hear the petitioner or to recognize him as an attorney at law in said causes, and informed the petitioner in open court that until the contempt committed by said petitioner in said court on the nineteenth day of April, 1905, was atoned for or the judgment of conviction against him satisfied or set aside, as a judge of said court he would not permit the petitioner to appear as an attorney at law and argue cases before him; that the petitioner objected to the action of the court and excepted thereto, but that said judge refused to make his action in declining to permit the petitioner to appear as an attorney at law in said court a matter of record, to the end that the same might be reviewed upon appeal or by writ of error.

[51] In the late case of People v. O'Brien, 196 Ill. 250, 63 N. E. 667, it was held that a contempt proceeding and a proceeding suspending an attorney at law from practice for malconduct in office were separate and distinct proceedings and could not be combined. When the court sentenced the petitioner to jail in the contempt proceeding it exhausted its power to punish the petitioner for the contempt committed by him in the presence of the court on the nineteenth day of April, 1905, and the release of the petitioner from imprisonment in consequence of the suing out of the writ of habeas corpus before a judge of the circuit court of Cook county did not revive the right of the judge of the superior court to again punish the petitioner for said contempt, and the judge of the superior court did not have the right to arbitrarily and without

hearing suspend the petitioner from practice as an attorney in the court over which he presided. This he could only do after the petitioner had been found guilty of malconduct as an attorney at law in accordance with the forms of law: Moutray v. People, 162 Ill. 194, 44 N. E. 196. The judge of the superior court had ample power to protect the court over which he presided from the insult of the petitioner and to punish the petitioner for misconduct committed by him in the presence of the court, as the right to punish for contempts committed in the presence of the court is inherent in all courts of record. The right, however, of suspension from practice in an inferior court and one from which the attorney's rights to practice do not emanate is vested in the nisi prius courts of this state only by virtue of the statute: Winkelman v. People, 50 Ill. 449.

The privilege of a regularly licensed attorney of this court to practice in cases in which he has been retained in the courts of this state is to such attorney a most valuable right and a right of which he cannot be deprived by the courts except for legal cause, and then only in the manner pointed out by law. We are of the opinion the petitioner has a clear legal right, as an attorney at law, to practice in [52] the branch of the superior court of Cook county presided over by the respondent, and that a clear legal duty rests upon the respondent, as a judge of said court, to permit him so to do, and that the petitioner cannot be deprived of said right other than by a proceeding carried on in accordance with the provisions of chapter 13 of Hurd's Statutes of 1903. Where the petitioner shows a clear legal right to the relief prayed for and a clear legal duty resting upon the respondent to recognize said right, mandamus will issue to enforce such right.

The writ of mandamus will therefore be awarded, in accordance with the prayer of the petition.

Writ awarded.

When an Attorney at Law charged with a criminal contempt of court is tried and found guilty of that charge the court has no power to suspend or disbar him from practice as a punishment for the contempt. To do this the accused must first have been accorded a trial under the safeguards of the special statute governing disbarment proceedings: State v. Root, 5 N. Dak. 487, 57 Am. St. Rep. 568. On grounds of disbarment generally, see the monographic notes to State v. Kirke, 95 Am. Dec. 333-345; In re Philbrook, 45 Am. St. Rep. 71-86.

STRAWBRIDGE v. STRAWBRIDGE.

[220 Ill. 61, 77 N. E. 78.]

WILLS.—The Term "Children" is primarily a word of purchase, and is not to be construed as equivalent to "heirs," in the absence of other words or circumstances showing it to have been used in that sense. (p. 227.)

WILLS.—The words "Heirs," "Issues," and "Children," when found in wills, may be construed interchangeably, when necessary to effectuate the intention of the testator. (p. 227.)

WILLS—Vesting Fee in the First Donee.—Courts favor that construction of a will which gives an estate of inheritance to the first donee. (p. 228.)

WILLS—Devise of Fee—Words Qualifying.—A devise of a fee simple estate will not be qualified or limited by other parts of the will, unless they show a clear intention to that effect on the part of the testator. (p. 228.)

WILLS.—A Testator is Presumed to have Intended to provide for the disposition of his entire estate. (p. 229.)

WILLS—"Children" Construed as "Heirs.—Where a testator devises his real property to his wife for life, and then gives all the residue of his estate to his "children," to be divided among them equally, naming them, "and to their children forever," the title in fee to the remainder passes to the children of the testator, when such appears to have been his intention as gathered from the language of the will, viewed in the light of the circumstances surrounding him at the time of the execution of the instrument. (p. 229.)

John T. Elliff, for the appellants.

Jesse Black, Jr., for the appellees.

62 BOGGS, J. This was a bill in chancery filed by the children and legal heirs of Benjamin Strawbridge, deceased, for the purpose of having a construction placed upon the fourth clause of his last will and testament. The testator in his last will, in the first clause thereof, bequeathed all his personal property to his wife. In the second clause he devised his real estate to his wife during her natural life. By the third clause he bequeathed to his son, Benjamin F. Strawbridge, the sum of two hundred dollars. The fourth clause is as follows: "I give and devise all the rest, residue and remainder of my real estate, of every name and nature whatsoever, upon the decease of my wife, Sarah Strawbridge, to be divided equally between my children, to wit: John B. Strawbridge, William R. Strawbridge, Benjamin F. Strawbridge, Harry Strawbridge, George B. McC. Strawbridge, Emma Mehan, Jesse Strawbridge and Parson Strawbridge, and to their children forever."

It appeared from the bill that John B. Strawbridge and Benjamin Franklin Strawbridge have not now, and have not

had, any children. William Strawbridge has eight children; Emma Mehan has ten children; Jesse Strawbridge has two children; Harry S. Strawbridge has seven children, three of whom were born after the death of the testator; George Strawbridge has seven children, two of whom were born after the death of the testator; and Parson Strawbridge has one child. Sarah Strawbridge, the life tenant, died on or about March 1, 1902. It does not appear from the allegations of the bill whether the children, or either of them, that were born to Harry S. Strawbridge and George Strawbridge after the death of the testator were born before the death of [63] the life tenant. The bill alleges that the testator had no real estate at the time of making his will or at the time of his death other than the real estate involved in the fourth clause.

The whole contention is as to the effect of the last words of said fourth clause, "and to their children forever." The appellees' contention is that the eight children of the testator named in the said fourth clause of the will take title in fee simple, appellants' contention being that the eight children above named take only a life estate. The true construction of the will was presented to the trial court on demurrer, and a decree was rendered construing the will to devise estates in fee to the sons and daughters of the testator named in the fourth clause of the will. Appellants abided their demurrer and prayed an appeal to this court.

The term "children" is primarily a word of purchase, and is not to be construed as equivalent to "heirs" in the absence of other words or circumstances showing it to have been used in that sense, but where there are other words in the will showing that the word "children" was used in the sense of "heirs," the term will be construed as a word of limitation equivalent to "heirs": 5 Am. & Eng. Ency. of Law, 2d ed., title "Children," 1092, 1093, and note 1 on the latter page. The words "heirs," "issue" and "children," when found in wills, may be construed interchangeably when necessary to effectuate the intention of the testator: Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589. In Leiter v. Sheppard, 85 Ill. 242, we found that the testator had employed the words "children" and "heirs" synonymously, and we interpreted the will accordingly. The testator in the clause of the will under consideration expressly devised "all the rest, residue and remainder of my real estate, ... upon the decease of my wife, Sarah Srawbridge, to be divided equally between my

children, to wit [naming eight of his children], and to their children forever." From this clause the meaning he intended to be given to the word "children," as used by the testator, must be determined.

[64] By section 13 of chapter 30 of the Revised Statutes of Illinois words of inheritance are not necessary in this state to pass a fee, and it is therein provided that "every estate in lands which shall be granted, conveyed or devised shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." The spirit of this statute and the disposition of the courts, as a matter of public policy, is to adopt such a construction as will give an estate of inheritance to the first donee: Leiter v. Sheppard, 85 Ill. 242. And when a fee simple is devised by a clause of a will, and other parts of the will are relied on as limiting and qualifying the estate given, they must show a clear intention on the part of the testator to so qualify or limit the estate, and unless such intention clearly and unequivocally appears the estate will not be limited: Giles v. Anslow, 128 Ill. 187, 21 N. E. 225. If the true intention of the testator as disclosed by this devise be held to create a life estate in his widow and a second life estate in each of his eight children named, with remainder over to their children, the construction so adopted would be in entire harmony with the spirit of the statute or with the disposition of this court to favor the adoption of such construction as would vest the fee in the first donee.

The provision that the "rest, residue and remainder" of the real estate is "to be equally divided between my children, to wit" (naming them), must necessarily refer to the eight children named, and the words "their children" must refer, respectively, to the children of each of the eight children of the testator named. Benjamin F. Strawbridge, one of the eight children of the testator named, was a bachelor without children and living with the testator at the time the will was made and at the time of the testator's death, and John Strawbridge, another of the eight children named, never had any children. If the construction that the eight children each take an undivided one-eighth interest for life with remainder [65] in fee to their children, respectively, therein, be adopted, as neither Benjamin F. nor John B. had child or children when the will was made or when the testator died, it would seem

that the probability that the shares devised to them would become intestate property would have occurred to the testator and have been provided against by him, as clearly he desired to control, by his will, the devolution of his property. He made a will, and it is to be presumed he intended to provide for the disposition of his entire estate, and it is our duty to adopt such a construction of the will as disposes of the entire estate if that meaning can reasonably be given to it: Craw v. Craw, 210 Ill. 246, 71 N. E. 450. If the meaning "their heirs" be given to the words "their children," the presumption that an entire disposal of the property of the estate was intended and the policy of the law that the fee should vest in the first taker will be given effect. If the words "their children" be given a literal and technical meaning, the well-settled presumption that the testator intended to make an entire disposal of his estate would not be given full operation, for he knew when he made the will that neither of these two sons had children, and with that knowledge it is highly improbable he would have employed the word "children" in the sense of natural offspring.

We think that the intention of the testator, as gathered from a fair reading of the whole will, viewed in the light of the circumstances surrounding the testator at the time of making the will, was to use the word "children" not in the sense of offspring, but in that other sense or meaning not infrequently given the word, of heirs generally.

The decree of the circuit court declaring title in fee to the remainder passed to the eight children of the testator named in the fourth clause of the will was correct, and must therefore be affirmed.

Cartwright, C. J., and Ricks, J., dissenting.

When the Words of a Will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate will not be cut down by subsequent or ambiguous words inferential in their intent: Gannon v. Albright, 183 Mo. 238, 105 Am. St. Rep. 471, and cases cited in the cross-reference note thereto.

The Word "Children," in a will, is generally a word of purchase and not of limitation; and while it may be used to signify heirs, it will not be so construed, unless the testator has employed other words indicative of an intention to use it as a word of limitation: Oyster v. Knutt, 137 Pa. St. 448, 21 Am. St. Rep. 890, and see the cases cited in the cross-reference note thereto. Consult, also, Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213; Mercantile Bank v. Ballard, 83 Ky. 481, 4 Am. St. Rep. 160. That the word "heirs" in a deed may be construed to mean children, see Griswold v. Hicks, 132 Ill. 494, 22 Am. St. Rep. 549.

BUTLER PAPER COMPANY v. CLEVELAND.

[220 Ill. 128, 77 N. E. 99.]

CORPORATION—Defective Formation—Liability of Officers. Proof of a corporation de facto does not relieve the officers and directors of the corporation from the liability imposed by the incorporation act of Illinois when its terms are not complied with. To escape that liability, there must be a corporation de jure. (p. 232.)

CORPORATION—Organization—Mandatory Statutes.—A failure substantially to comply with mandatory statutory provisions in the organization of a corporation prevents the corporation from becoming one de jure, but a failure to comply with merely directory provisions does not have this effect. (p. 232.)

CORPORATION—Organization—Notice of First Meeting.—The provisions of the incorporation act of Illinois that notice of the meeting to elect directors "shall" be given by mail to subscribers of stock is directory merely, and, if they all agree thereto, may be waived. (pp. 232, 233.)

CORPORATION—Meetings—Statutory Notice.—If the persons entitled to notice of a corporate meeting actually attend it and participate in the business there transacted, it is immaterial whether the notice was given in the manner prescribed by statute. (p. 233.)

CORPORATION—Notice of Meeting—Filing with Secretary of State.—The requirement of the incorporation act of Illinois that a copy of the notice of the meeting to elect directors shall be included in the report to the Secretary of State does not make mandatory a further requirement of the statute that notice of such meeting shall be given by mail to subscribers of stock, and it may be satisfied by including the report of a written instrument signed by all subscribers in which such notice is waived. (p. 234.)

Asa Q. Reynolds and William A. Bither, for the appellant.

129 SCOTT, J. This suit was brought in the superior court of Cook county by the J. W. Butler Paper Company against Frederick W. Chamberlain, Harold I. Cleveland and Harriet F. Cleveland, to recover the sum of thirteen hundred and five dollars and eighty cents alleged to be due the plaintiff for merchandise sold by it to the defendants as officers and directors of the C. & C. Company, a corporation organized under the statute of this state. Chamberlain was a resident of the state of Michigan, and process was not served upon him. The other two defendants entered their appearance and filed the general issue to the plaintiff's declaration. A trial was had before the court without a jury, by agreement of the parties, upon a stipulation of facts, and the court found the issues in favor of the defendants, and, after overruling a motion for a new trial, entered judgment against the plaintiff for costs of suit. The plaintiff appealed to the appellate court for the

first district, and that court having affirmed the judgment of the superior court, a further appeal has been prosecuted to this court.

The only question arising upon the record in the case, which is presented by certain propositions of law offered by the plaintiff below and refused by the court, is whether there [130] was such a failure to comply with the provisions of "An act concerning corporations" (approved April 18, 1872, in force July 1, 1872), in organizing the C. & C. Company, of which the defendants were officers and directors at the time the merchandise was sold by the plaintiff to the C. & C. Company, as to render the defendants individually liable to the plaintiff therefor under section 18 of chapter 32 of Hurd's Revised Statutes of 1903. That section, which was construed by this court in Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99, reads as follows: "If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation."

The sole ground relied upon by the plaintiff as showing a defective incorporation of the C. & C. Company is the fact that the meeting of the subscribers to the capital stock of the company, held for the purpose of electing directors and for the transaction of such other business as might come before them, was not called in the manner pointed out by the statute.

Section 3 of chapter 32, supra, provides that notice of such meeting shall be given "by depositing in the postoffice, properly addressed to each subscriber, at least ten days before the time fixed, a written or printed notice, stating the object, time and place of such meeting."

Frederick W. Chamberlain, Harold I. Cleveland and Harriet F. Cleveland were the only subscribers to the capital stock of the C. & C. Company. The license to open books of subscription to the capital stock of the company was issued on December 10, 1902. On December 12, 1902, the [131] three subscribers above named executed a written instrument by which they waived the notice provided for by section 3, supra,

and requested the commissioners to convene the meeting at 12 o'clock, noon, of that day at room 913 Monadnock block, in the city of Chicago, for the purpose of electing directors and the transaction of such other business as might come before them. Prior to the meeting, in pursuance of this written instrument, a notice was personally delivered to each of the three subscribers, notifying them of the object, time and place of the meeting. The subscribers met at the time and place specified and elected a board of directors, consisting of themselves and George A. Miller, who was one of the commissioners to whom the license had been issued by the Secretary of State.

A decision of this case depends upon the question whether the C. & C. Company is a corporation de jure. Proof of a corporation de facto does not relieve the directors and officers of the corporation from the liability imposed by section 18, supra. There must be a corporation de jure in order to escape that liability: Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Gunderson v. Illinois Trust etc. Bank, 199 Ill. 422, 65 N. E. 326.

The statute prescribes a certain course to be pursued in organizing a corporation in this state. It does not necessarily follow, however, that any departure from that course will prevent a corporation from becoming one de jure. Whether or not such departure will have that effect depends upon the nature of the provision which is violated. If it is a mandatory provision, a failure to substantially comply with its terms will prevent the corporation from becoming one de jure; but if the provision is merely directory, then a departure therefrom will not have that consequence.

In Cooley's Constitutional Limitations, star page 78, it is said: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested [132] will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute."

The provision of the statute here under consideration, requiring notice of the first meeting to be given to the subscribers to the capital stock of a corporation being organized, by mailing to them notices stating the object, time and place

of such meeting, at least ten days before the time fixed for such meeting, is evidently intended only as a direction "given with a view merely to the proper, orderly and prompt conduct" of the commissioners in calling such meeting, and a failure to obey that provision will not prejudice the rights of any persons interested therein if the same result is reached in some other mode. The only persons interested in the result to be attained by giving notice of the object, time and place of a meeting of the subscribers to the capital stock of a corporation for the purposes specified in the statute are the subscribers themselves. We perceive no reason why such persons, where all agree thereto, may not waive the giving of the statutory notice, if the meeting is actually held, as the purpose of the statute in requiring the notices to be given has in such case been accomplished.

The mere fact that the word "shall" is used in the statute in providing for the notice does not render the provision mandatory: Canal Commrs. v. Sanitary Dist., 184 Ill. 597, 56 N. E. 953.

In the case of Newcomb v. Reed, 12 Allen (Mass.), 362, in discussing the effect upon the legality of a corporation where the call for the first meeting was signed by only one of the persons named in the act of incorporation instead of by a majority of such persons, as required by the statute of Massachusetts, the court said: "The organization was not strictly regular, but can hardly be considered even as defective. And if the object of the statute is regarded, by [133] which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory, merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings. The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of Lechmere Bank v. Boynton, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation."

Cases have also arisen in this state in which the effect of a failure to give notice of corporate meetings in the manner provided by the statute have been considered, and it has been uniformly held that it is immaterial whether or not such notice has been given in the manner pointed out by the statute, if the persons entitled to such notice actually attend the meeting and participate in the business there transacted: Thomas v. Citizens' Horse Ry. Co., 104 Ill. 462; Gade v. Forest Glen Brick Co., 165 Ill. 367, 46 N. E. 286.

This case is distinguishable from Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99, which is relied upon by appellant, in that notice of the first meeting of subscribers is not intended for the benefit of the public, as no publicity of such meeting is required, but is merely for the benefit of the subscribers, while in the Loverin case the provision which was not complied with was that requiring the certificate of complete organization issued by the Secretary of State to be filed and recorded in the office of the recorder of deeds of the county in which the principal office of the corporation is located, and a compliance with the statute in that regard was essential because the [134] provision was one for the benefit of the public, and could not be waived.

It is urged that the fact that section 4 of the act in question requires a copy of the notice provided for by section 3, supra, to be included in the report made to the Secretary of State, shows that the statute contemplates compliance with the statute in regard to giving notice. We think this provision is fully satisfied by including in such report the written instrument signed by all the subscribers in which such notice is waived.

The superior court did not err in refusing the propositions of law and in entering judgment upon the stipulation of facts in favor of the defendants and against the plaintiff for costs.

The judgment of the appellate court will be affirmed.

In the Recent Case of Navajo Min. etc. Co. v. Curry, 147 Cal. 581, 109 Am. St. Rep. 176, it is held that the prohibition of the constitution against any increase of the capital stock of a corporation without the consent of those holding the larger amount in value of the stock, "at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law," is mandatory and not directory, and that an attempted increase of capital stock at a meeting held by unanimous consent, without the notice prescribed by the constitution and Civil Code is ineffectual. An examination of the authorities cited in the cross-reference note to that case, however, will disclose that the decision is hardly sustainable, either on principle or authority.

A Corporation May be Formed by a substantial compliance with the statutory requirements, but not without such compliance: Pott v. Smucker, 84 Md. 535, 57 Am. St. Rep. 415; Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151.

CENTRAL ACCIDENT INSURANCE COMPANY v. REMBE.

[220 Ill. 151, 77 N. E. 123.]

ACCIDENT INSURANCE—Blood Poisoning from Wound.—A policy of insurance against death by external violence and accidental means covers the case of one who accidentally cuts his finger by the breaking of a bottle from which wound blood poisoning ensues, and death results. (p. 237.)

ACCIDENT INSURANCE—Blood Poisoning from Wound.—A clause in an accident insurance policy exempting the insurer from liability for death resulting from the "taking of poison or contact with poisonous substance" does not embrace a case where the insured, a physician, while preparing medicine for a syphilitic patient, accidentally cuts his finger by the breaking of a bottle, and the virus from the patient enters the wound causing fatal blood poisoning. (p. 240.)

ACCIDENT INSURANCE—Blood Poisoning—Operation.—A slip attached to a policy of accident insurance issued to a physician, which extends the policy to cover "septic wounds caused by accident while performing any operation pertaining to the business of the insured, the poison matter being injected into the wound at the time of the accident," is not confined in its operation to accidents met with by the insured while in the act of performing an operation or administering treatment upon a patient, but includes accidents which occur while he is preparing medicine for a patient. (p. 241.)

Action upon a policy of insurance issued to Dr. Edward Rembe. At the time of his insurance, the policy tendered him contained this clause: "This policy does not cover death resulting wholly or partially from any of the following causes: voluntary or involuntary taking of poison or contact with poisoned substance." He declined to accept it, insisting upon an additional provision to cover blood poisoning, whereupon the following slip was attached to the policy: "Policy No. 75,719 is hereby extended to cover that class of injuries known as septic wounds, caused by accident while performing any operation pertaining to the business of the insured, the poison matter being injected into the wound at the time of the accident and resulting in disability or death under the conditions of the policy."

After the policy went into effect, the insured, in the course of his practice, treated a patient afflicted with syphilis. Dur-

ing the treatment in his office, while in the act of preparing medicine to be administered to the patient, he accidentally cut his finger while removing a cork from a bottle which broke. On the afternoon of the same day, and again upon the next day he treated a child suffering from an abscess in her ear which discharged pus. In a few days blood poisoning developed in his injured hand, from which he died. The insurance company declined to pay the policy, and this appeal is from a judgment recovered against the company by the beneficiaries.

King & Miller, for the appellant.

Blinn & Covey, for the appellees.

155 WILKIN, J. The defendant made timely and proper motions to have the jury instructed to find it not guilty, but the motions were overruled and exceptions taken. That ruling is assigned as error; also that the trial court erred in the giving of the first and second instructions on behalf of the plaintiffs. Most of the brief and argument on behalf of the appellant is devoted to the alleged error in giving those instructions, although the refusal to give the peremptory instruction is urged as reversible error and may be properly considered first, for the reason that if there was error in that regard other questions are immaterial.

The declaration contains two counts. The first declares upon the policy as it was first tendered to the assured without the attached slip, and avers that while the deceased was 156 in pursuit of his avocation as a physician and surgeon, and while undertaking to remove the cork from a bottle, his finger was injured, and the wound caused blood poisoning, resulting in his death. The second declares upon the policy as modified by the attached slip, and avers the injury from the broken bottle, and that poison matter from the patient suffering from syphilis became injected into the wound at the time of the accident, resulting in death.

The evidence is to the effect that on November 25, 1903, the date of the injury to the finger, Dr. Rembe, the insured, was a middle-aged man of strong physique, enjoying perfect health; that he was on that day called upon to treat a patient suffering with syphilis, and while preparing medicine for him and attempting to remove the cork from a bottle he accidentally broke the neck of the bottle, the pieces of glass cutting a small wound in the middle finger of his right hand;

that he immediately dressed the wound and bandaged it, but the next morning the hand began to swell, causing him great pain, and finally resulted in his death from septicæmia, or blood poisoning, three weeks later. These facts are not disputed, and they not only tend to prove, but establish, the fact that the death of the insured resulted from the accidental injury to his finger, and we are unable to see how it can be seriously contended that under these facts and the law applicable to the case his beneficiaries are not entitled to recover under the first count of their declaration. The policy without the attached slip provided that upon the death of the insured caused by external violence and accidental means the company would pay to the beneficiaries therein named, if surviving, the sum of five thousand dollars. The contention of the defendant below is, that the death was not caused by the wound alone, but by blood poisoning, and therefore the company is not liable—in other words, that the injury was not the proximate cause of the death of the insured. The cause of the death, as we understand it, was the wound in the finger, by means of which blood poisoning intervened. Without [157] the accidental wounding of the finger blood poisoning would not have ensued, and therefore that disease was only incidental to the wound. If we turn to the evidence of the physicians who testified in the case, we find that they, with one accord, agreed that under the facts and circumstances shown the septicæmia, or blood poisoning, would not have been produced but for the incision or wound in the finger, into which the poisonous germs entered and contaminated the blood. At least their evidence strongly tends to prove that fact, and for the purposes of this decision that is all that is necessary.

In Martin v. Manufacturers' Accident Indemnity Co., 15 N. Y. 94, 45 N. E. 376, the insured accidentally injured the second finger of his right hand in some way not clearly explained, but probably from the wires of an unbrella which he was attempting to raise, and the injury was followed by blood poisoning, of which he afterward died. Prior to the injury of the finger he had crushed the thumb of his left hand, and one of the questions in the case was whether the wound of the finger was the only, proximate and sole cause of the death of the insured—that is, whether or not the accident and inoculation of the wound were coincident, or whether the inoculation occurred after the injury, from suppuration of

the wound on the thumb of the left hand. The question whether the blood poisoning was caused by matter from the wound on the thumb or was immediately developed from the wound on the finger, by inoculation or otherwise, at the very time of that injury, was litigated on the trial, and medical experts were called by each side to testify on the subject. The court charged the jury, in substance, that if the blood poisoning was caused by contact of the wound, or from matter communicated from the thumb after the injury to the finger, the plaintiff could not recover. The court of appeals said: "We think the court did not err to the prejudice of the defendant in charging that if the jury should find that the virulent matter which produced the blood poisoning [158] was communicated to the wound coincident with its infliction, and the death was produced by the blood poisoning, it was a death within the policy. The policy provides that the insurance shall not extend 'to any case except where the injury is the proximate and sole cause of the disability or death.' There was medical testimony to the effect that the virus was probably on the umbrella, or whatever instrument it was which inflicted the wound; and the condition of the thumb and the bandaging afforded an inference that that was not the source of the virulent infection. All the evidence upon this point was submitted to the jury, including the statement of the assured in the notice of injury, and the jury having found the fact in favor of the plaintiff, the finding cannot now be disturbed. Upon the fact as found, the inoculation of the wound at the very time of its infliction was a part of the injury and the immediate cause of the death. Without the wound there would have been no inoculation, and so, without the inoculation the wound would not, probably, have been fatal. But it is impossible to separate the two in the practical construction of the conditions in question. Both were contributing and coexisting causes of the death, set in motion and operating together from the same moment of time."

In the case of Western Commercial Travelers v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653, the accidental abrasion of the skin of one of the toes of the insured resulted in blood poisoning and death. The United States circuit court of appeals in deciding the case said: "It is earnestly contended, however, that the death was not caused by bodily injuries effected by external, violent and accidental means,

because the disease of blood poisoning was the cause and the abrasion of the skin of the toe was only the occasion—the locality in which the disease first appeared. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent and accidental [159] means which produced the bodily injury, the association was equally liable to pay the indemnity. In such case the disease is an effect of the accident; the incidental means produced and used by the original moving cause to bring about its fatal effect; a mere link in the chain of causation between the accident and the death." To the same effect are the cases of Omberg v. United States Mutual Acc. Assn., 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; Freeman v. Mercantile Mutual Accident Assn., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774; Young v. Accident Ins. Co., 6 Colo. 1.

In the case of Delaney v. Modern Accident Club, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603, it was said: "The simple question is whether the death of Delaney resulted through natural causes, without the interposition of a new and independent cause from the cut on his finger. Disease brought about as the result of a wound, even though not the necessary or probable result, yet if it is the natural result of the wound and not of an independent cause, is properly attributed to the wound, and death resulting from the disease is a death resulting from the wound, even though the wound was not, in its nature, mortal or even dangerous."

The doctrine announced by all of these cases is tersely stated by Niblack on Benefit Societies and Accident Insurance, page 768, in which he says: "If the inoculation occurred at the time the wound was made and was a part of the accident, the accident was the sole and proximate cause of the death, though blood poisoning ensued."

The claim, not seriously insisted upon, that the inoculation was caused by the pus discharged from the child's ear is wholly unsupported by the evidence.

The policy in this case, without the slip, exempted the company from liability if death resulted from the "taking of poison or contact with poisonous substance," and it is contended by counsel for appellant that the death of the insured was caused by the wound coming in contact with virus

from the syphilitic patient, either upon the hands of the doctor [160] or upon the neck of the bottle which was broken. The rule is familiar that policies of insurance, especially where they seek to limit the liability of the insurer, must be construed most strongly against the company issuing the policy and whose language it is. We do not think, under that rule, the language of the policy can be given the meaning here attempted to be put upon it. If poisoning germs entered the wound, causing blood poisoning, that wound would not be within the fair meaning of the policy, "coming in contact with poisonous substance," causing death. Even if the germs were a poisonous substance within the meaning of the policy, those germs, according to the testimony, would have produced no injurious effect but for the wound in the finger. They only became poisonous when allowed to mingle with the blood.

We are not to lose sight of the fact that by the verdict of the jury, the judgment of the circuit court and the affirmance by the appellate court every controverted fact in the case must be treated as conclusively settled in favor of the plaintiffs and against the defendant. It seems to us clear that under the evidence the judgment was fully authorized under the first count of the declaration.

We are also satisfied that the evidence in the case justified the verdict of the jury and the judgment of the circuit court under the second count of the declaration. The slip attached to the policy, upon which this count is based, was added because the insured refused to accept the insurance without it. Its language, which, as already said, is strictly the language of the company, is, that the policy shall be "extended to cover that class of injuries known as septic wounds, caused by accident while performing any operation pertaining to the business of the insured, the poison matter being injected into the wound at the time of the accident and resulting in disability or death under the conditions of the policy." It seems to be contended on behalf of the appellant that this provision only covers cases where a surgeon or physician [161] is in the act of performing an operation or administering treatment upon a patient and in the act meets with some accident which causes a wound, and it is said that the wound in this case was not inflicted while the doctor was so engaged in performing an operation or administering treatment to the patient. In our opinion this is too narrow a

construction of the language of the policy. Applying the rule of construction already stated (Healey v. Mutual Accident Assn., 133 Ill. 556, 23 Am. St. Rep. 637, 25 N. E. 52, 9 L. R. A. 371; Queen Ins. Co. v. Dearborn Sav. Assn., 175 Ill. 115, 5 N. E. 717; Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139), suppose the insured had cut his finger by accident while preparing instruments with which to perform a surgical operation, or if, after the operation, in disinfecting the instrument used he had accidentally wounded himself and blood poisoning had in either case intervened, would it be claimed there was no right of recovery under the conditions of this policy? We hardly think it would be seriously so contended. The clause is, "caused by accident while performing any operation pertaining to the business of the insured." His business was both that of a surgeon and physician. His treatment of the patient was a continuing service, and should not be limited to any particular act in such treatment. The preparation of medicine to be taken internally at the very time the patient was in his office, or subsequently, according to directions, was, we think, administering treatment pertaining to the business of the insured, within the meaning of this clause of the policy.

Objection is made to the first instruction given on behalf of the plaintiffs, which was applicable to this count. It told the jury that if it found that the insured was a practicing physician and surgeon, and while treating a patient cut his finger on a broken bottle, making a visible wound commonly known as a septic wound, by means whereof poison matter was injected into the wound at the time of the accident, from which a disease commonly known as blood poisoning intervened, from the effect whereof and within ninety days said [162] insured died, then such injuries were within the terms of the accident policy read in evidence and would create a liability in favor of the plaintiffs for the amounts stipulated in the policy. The language of the policy is, that the company shall be liable for disability or death by external violence and accidental means, which shall, "independently of all other causes," etc. The objection to the instruction is, that it does not use the word "operation" in the sense in which it is used in the slip attached to the policy, the contention being that it was used in its strictest sense as applied to surgery. For

the reason already given we do not think this contention can be maintained. "Operation" means treatment pertaining to the business of the insured.

Complaint is also made of the giving of the second instruction, which is applicable only to the first count. It told the jury that if they found, from a preponderance of the evidence, that the deceased, during the lifetime of the policy, accidentally cut his finger, making a visible wound, from the effect of which, within ninety days, he died, then the company was liable. The policy insured the deceased against accident and death from external, violent and accidental means, "independently of all other causes," and the objection to this instruction is that it does not use the quoted words. We do not understand that it was necessary to negative the language used in the policy in the instruction. If the accidental cutting of the finger caused the death, then, under the proof in this case, it was clearly independent of all other causes and there was no reversible error in the instruction. Moreover, the jury were instructed, at the instance of the defendant, that unless the plaintiffs established, by a preponderance of the evidence, that the death charged in the declaration was by accidental, external and violent means solely, then they should find for the defendant.

We think this record is substantially free from error, and the judgment of the appellant court will accordingly be affirmed.

If an Accident Insurance Policy insures against death from bodily injury caused through external, violent, and accidental means, but exempts from liability for death from hernia or medical and surgical treatment, the insurer is liable when the proximate cause of death is hernia inflicted by external, violent, and accidental means: Travelers' Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267. See, too, Fetter v. Fidelity etc. Co., 174 Mo. 256, 97 Am. St. Rep. 560; Horsfall v. Pacific etc. Ins. Co., 32 Wash. 132, 98 Am. St. Rep. 846.

Death Caused by Blood Poisoning, superinduced by the bite of an insect, is not the result of "poisoning in any form or manner," or "contact with poisonous substances," within the meaning of accident insurance policy: Omberg v. United States Mut. Acc. Assn., 101 Ky. 303, 72 Am. St. Rep. 413.

RISSMAN v. WIERTH.

[220 Ill. 181, 77 N. E. 108.]

WILLS.—Under the Rule in Shelley's Case, a devise to the wife of the testator, "to hold and to have to her, and to her heirs and assigns forever, but if she gets married again, then at the time of her second marriage, one-half to be sold and divided as follows," vests the fee in the widow. (p. 244.)

WILLS.—The Application of the Rule in Shelley's Case to any particular case depends not upon the quantity of estate intended to be given to the ancestor, but upon the estate devised to the heir. (p. 246.)

WILLS.—The Rule in Shelley's Case is not confined to cases where, by the express language of the testator, a freehold estate is created in the ancestor. (p. 246.)

WILLS.—Where the Rule in Shelley's Case applies, the subsequent expressed intention of the testator to the contrary can have no effect. (p. 246.)

This appeal involves the construction of the following provisions of the will of John Michael Rupprecht.

"*Second*—I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my beloved wife, Sibila Barbara Rupprecht, to hold and to have to her, my said wife, and to her heirs and assigns forever, but if she gets married again, then at the time of her second marriage one-half of said estate, real and personal, to be sold and divided as follows: (Here follow bequests to various legatees, most of whom are appellees here.)

"*Third*—If anything remain of the estate, real and personal, after said division, it shall be divided equally among the above-named persons.

"*Fourth*—If my beloved wife, Sibila Barbara Rupprecht, remain my widow, she is to have and to hold the whole estate, real and personal, for her own support until her death, and after her death the residue shall be divided among the above-named persons in the proportion of what is named to the whole.

"*Fifth*—If any of the above-named heirs should die before the division of said estate, then said heirs' proportion shall revert back to the estate and be divided as the whole estate."

H. S. Earley, H. T. Smith, William Vocke and William Mannhardt, for the appellants.

C. I. McNett and J. N. Finnegan, for the appellees.

[184] WILKIN, J. The only question in this case is whether or not the widow of John Michael Rupprecht, Sibila Barbara Rupprecht, took under her husband's will an estate in fee simple, which upon her death would descend to the heirs at law, or [185] whether, by a proper construction of that will, she took a life estate, the remainder being vested in appellants. This question depends upon whether or not the rule in Shelley's Case is applicable to the second clause of the will. It will be observed that the language of that clause is: "I give, devise, etc., to my beloved wife, Sibila Barbara Rupprecht, to hold and to have to her, my wife, and to her heirs and assigns forever." Under the repeated decisions of this court, unless it can be said that the words "her heirs and assigns forever" are to be given some limited or qualified meaning—i. e., that they are not used in their strict legal sense—the rule applies and the fee simple title under it vested in the widow. In Vangieson v. Henderson, 150 Ill. 119, 36 N. E. 974, the will provided, "after the death of my wife, as aforesaid, I give, devise and bequeath unto my beloved daughter, Nora A. Vangieson, during her natural life, and after her death to descend and vest in her legal heirs, thirty-five acres" (describing the land), and we held that the daughter took the title to the land in fee, the rule being, that whenever the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either immediately or mediately, to his heirs, either in fee or in tail, the word "heirs" is one of limitation of the estate and not of purchase, and the ancestor takes the fee. The word "heirs," being used in the general legal sense, is, under the rule, one of limitation, and no intention of the testator, however clearly expressed, can change it into a word of purchase: Wolfer v. Hemmer, 144 Ill. 554, 33 N. E. 751; Silva v. Hopkinson, 158 Ill. 386, 41 N. E. 1013; Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28. Many other cases will be found in our reports to the same effect.

Counsel for appellants concede, as we understand them, that this is the law of Illinois, but they seek to distinguish the present case from those cases which have been heretofore decided, upon the ground that no intermediate estate is created by this will—that is, that the second clause does not vest a freehold estate in the wife and the fee in her heirs, which is [186] necessary under the rule; in other words, they say there is here no intermediate estate. While this clause does not, in

any express language, vest a life estate in the widow, such is the clear legal effect of it. In Carpenter v. Van Olinder, 127 Ill. 42, 11 Am. St. Rep. 92, 19 N. E. 868, 2 L. R. A. 455, speaking of the application of the rule, we said, quoting with approval from Preston in his work on Estates (volume 1, page 281): "Neither the express declaration, first, that the ancestor shall have an estate for his life and no longer, ... nor, thirdly, that the ancestor shall be tenant for his life and no longer, ... will change the word 'heirs' into a word of purchase."

In Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814, where the language of the will was, "I give and devise unto my sons, Frederick C. Hageman, George W. Hageman, Franklin J. Hageman and Louis B. Hageman, lots 10," etc., but they "shall neither of them sell or mortgage any of the lots above mentioned, but the same shall go to their heirs after them," it was said: "The question presented is whether, under this language of the will, the complainants, sons of the testator, took an estate for life in the lots devised or took the estate in fee," and we held that they took a fee simple estate, and again quoted from Preston on Estates, as follows: "In wills, the rule applies generally and without exception to the several limitations as often as the gift to the heirs is without any expression of qualification, and that neither the express declaration, first, that the ancestor shall have an estate for his life and no longer, nor, secondly, that he shall have only an estate for life in the premises, and that after his decease it shall go to the heirs of his body, and in default of such heirs vest in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator; nor, thirdly, that the ancestor shall be tenant for his life and no longer, and that it shall not be in his power to sell, dispose or make way with any part of the premises, ... will change the word 'heirs' into a word of purchase." And we further said: "The rule in Shelley's Case is a rule of property [187] in this state (Baker v. Scott, 62 Ill. 86; Ryan v. Allen, 120 Ill. 648); and its application to the particular case depends not upon the quantity of estate intended to be given to the ancestor, but upon the estate devised to the heir. When the devise is to heirs generally, the rule applies and is held to conclusively express the intention of the testator, and will necessarily govern and control in determining the estate devised, notwithstanding the expression of an intention on the

part of the testator that the ancestor shall take a less estate than the fee. The devise, here, must therefore be treated as if it were to the sons of the testator and their heirs, without qualification, in which event it is clear the sons would take the fee in the estate devised: See Carpenter v. Van Olinder, 121 Ill. 42, 11 Am. St. Rep. 92, 19 N. E. 868, 2 L. R. A. 455."

In Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28, among the latest expressions of this court on the application of the rule, we said that "manifestly, under the provision contained in the will, 'to my son, William L. Deemer, and to his lawful heirs,' William took a freehold estate, and the estate was limited immediately to his lawful heirs in fee, which fulfilled every requirement of the rule and vested the fee simple title in William L. Deemer. By the terms of the codicil, William L. Deemer is given the 'use, benefit and control' of the premises 'during his lifetime,' the effect of which was to vest an estate of freehold in him, and at his death the fee is given to his lawful heirs. In legal effect the devise to William L. Deemer contained in the codicil and that contained in the will are the same—that is to say, a freehold estate by each of said provisions is given to William L. Deemer and an estate in fee is limited immediately to his lawful heirs, and the fee to the premises, under the codicil as well as under the will, vested in William L. Deemer." And so, if the position of counsel for appellants is tenable that the rule has application only where, by the express language of the testator, a freehold estate is created in the ancestor, many of our former decisions would have to be overruled.

188 Nor do we think there is any reasonable ground for saying that the word "heirs" is not used in the second clause of this will in its legal sense; and it is too well settled to be longer a matter of discussion in this state that where the rule applies, the subsequent expressed intention of the testator to the contrary can have no effect. Nor do we think there is any such inherent evidence of ignorance of the law in the draft of this will as to render it of uncertain or doubtful interpretation.

Our conclusion is that the circuit court properly held the rule in Shelley's Case applicable to the second clause of this will.

Nor are we disposed to disturb the finding and decree of the court on the assignment of cross-errors as to the allowance of the solicitor's fee to counsel for appellants.

We think the decree of the circuit court is in conformity with the law and facts of the case, and it will accordingly be affirmed.

The Rule in Shelley's Case was sought to be invoked in Johnson v. Buck, 220 Ill. 226, 77 N. E. 163, where one clause of a will under consideration provided as follows: "I give, devise and bequeath all my estate of every character and wheresoever situate, to my daughters Jeannette E. Buck, Georgie E. Wood, and Minnie J. Ragland, and to my grandson, George Park Johnson, and their heirs, share and share alike."

"The rule in Shelley's Case," said the court, "is in full force in this state. The rule stated in that case was, that 'where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the heirs are words of limitation of the estate and not words of purchase.' The rule was quoted in Baker v. Scott, 62 Ill. 86, and the court added the definition from Preston on Estates: 'When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and afterward, in the same deed, will or writing there is a limitation, by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or his heirs of his body, by that name in deeds or writings of conveyance, and by that or some such name in the wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation.' The rule has been otherwise stated as follows: 'The rule in Shelley's Case says, in substance, that if an estate of freehold be limited to A, with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor': 1 Hayes on Conveyancing, 542. It will be seen that there are two necessary elements in every deed or will to which the rule applies: 1. There must be a gift or conveyance of a freehold estate to the ancestor; and 2. There must be a limitation, by way of remainder, to his heirs. The codicil construed in the case of Deemer v. Kessinger, 206 Ill. 57, 69 N. E. 28, where lands were given to William L. Deemer during his lifetime, with limitation over, after his death, to his heirs, shows the proper application of the rule. The will in this case does not come within the rule in any respect. It does not purport to devise to plaintiff in error a freehold estate, with a limitation, by way of remainder, to his heirs, but the devise in the second clause is to him and defendants in error and their heirs, which is the proper mode of devising a fee simple. Such words are not the words necessary to be employed to confer a freehold estate upon the ancestor with a remainder to his heirs, but are words which in a will or conveyance transfer the fee. As the will does not purport to limit a remainder to heirs of the plaintiff in error but to confer the estate immediately upon him, the rule in Shelley's Case has no application. In some cases where the same result was necessarily reached on other grounds, the rule in Shelley's Case may have been inadvertently applied to a devise like this, but it is clear that the rule has nothing to do with this devise."

The Rule in Shelley's Case is discussed in the notes to Carpenter v. Van Olinder, 11 Am. St. Rep. 100-107; Polk v. Faris, 30 Am. Dec. 415-417; and in the recent cases of Davenport v. Eskew, 69 S. C. 292, 104 Am. St. Rep. 798, and authorities cited in the cross-reference note thereto; Thompson v. Crum, 138 N. C. 32, 107 Am. St. Rep. 514.

FRANKLIN UNION NO. 4 v. PEOPLE.

[220 Ill. 355, 77 N. E. 176.]

PLEADING.—The Want of Capacity to File a Bill in chancery by a voluntary association must be taken advantage of by demurrer or plea, otherwise the defect is waived and the question cannot be raised in the supreme court on appeal. (p. 253.)

INJUNCTION—Voluntary Association—Defect of Parties.—If there is a defect of parties where a bill for an injunction is filed in the name of a voluntary association on behalf of its members, instead of in the names of the members, the order granting an injunction is not void, and the defendants are not justified in violating it. (p. 254.)

INJUNCTION—Error in Granting—Contempt in Violating.—When a court has before it a party asking for an injunction, and the party against whom it is asked, upon a bill stating a case within its general equitable jurisdiction, the court has jurisdiction to determine whether an injunction should issue, and the character thereof; and if it errs in granting an injunction when none should issue, or in granting an injunction broader than the averments of the bill justify, such errors cannot be urged as a defense in proceedings for contempt in violating the injunction. (p. 256.)

COURTS.—The Jurisdiction of a Court does not Depend upon the correctness of its order; jurisdiction is not lost by entering a decree, however erroneous. (p. 257.)

JUDGMENT—Obedience to Erroneous Order.—The order of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. (p. 258.)

INJUNCTION—Error in Granting, How Reached.—If the defendants deem an injunction broader than the averments of the bill justify, they should apply to the court to modify it, and not violate it. (p. 258.)

CONTEMPT.—A Corporation may be Adjudged Guilty of contempt in violating an injunction, and punished by a fine enforceable by a sequestration of its property. (p. 259.)

CONSPIRACY.—A Conspiracy is an Agreement or combination formed between two or more persons to do an unlawful act or to do a lawful act by unlawful means. (p. 264.)

CONSPIRACY.—A Combination may Amount to a conspiracy, although its object is to do an act which would not be unlawful if done by an individual. (p. 264.)

CONSPIRACY.—An Agreement or Combination, to constitute a conspiracy, need not be evidenced by a writing; it may be a verbal scheme or undertaking evidenced by the actions of the parties. (p. 264.)

CONSPIRACY.—Each Conspirator is Liable, when a conspiracy has once been entered into, for all the acts of his co-conspirators done in furtherance of the objects of the conspiracy. (p. 265.)

CONSPIRACY—Evidence.—When a Conspiracy is established, everything said, written, or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them, and may be proved against each. (p. 265.)

STRIKES.—Employés have a Right to Quit their employment either singly or in a body, although their conduct in so doing involves a breach of contract. (p. 265.)

STRIKES—When Unlawful—Injunction.—When the officers and members of a labor union agree together that by calling a strike, and by force, threats, intimidation, and picketing they will prevent the members of their employers' association from employing other workmen in their places, they enter upon an unlawful undertaking, the carrying into effect of which may be enjoined. (p. 266.)

STRIKES—Unlawful Conduct—Responsibility of Union.—Where a labor union inaugurates a strike and sets in motion forces which produce intimidation, coercion, and violence, it cannot excuse itself by the statement of its officers that they advised the members of the union to be orderly and obey the law. (pp. 266, 267.)

STRIKES—Spying and Intimidation in Highway.—A citizen must be accorded the right to go to and from his place of business or employment without interference; to follow him, to spy after him, to intimidate or coerce him are alike unlawful. (p. 267.)

STRIKES—Liability of Union for Unlawful Acts of Members.—Where a labor union organizes and conducts a strike, through its officers, the organized entity or corporation can be reached and punished for the threats, intimidation, force, and violence which flow from the unlawful acts which it instigates its members to commit. (p. 268.)

CONTEMPT by Labor Union in Violating Injunction.—A labor union may be adjudged guilty of contempt for violating an injunction and be fined therefor. (p. 268.)

CONTEMPT—Manner of Setting Forth Charge.—In proceedings for contempt committed out of the presence of the court, it may be brought to the attention of the court by an affidavit setting forth the facts. A petition is not necessary. But if a petition is filed for that purpose, it is sufficient, if it fully apprises the defendant of the charge against him, although it does not set out the charge with the particularity of an indictment. (p. 269.)

CONTEMPT—Order Adjudging Defendant Guilty.—An order in contempt proceedings which refers to the petition and the affidavits filed in its support, and which in apt terms adjudges the defendant guilty of violating an injunction, setting out the manner of the violation, adjudging it to be a contempt, and imposing a fine, is sufficient. (p. 270.)

CONTEMPT.—On Appeal from an Order adjudging persons guilty of a contempt, they cannot, in the absence of a certificate of the clerk that they have filed a complete record, raise the question that the recitals found in the several orders appealed from are not sufficient upon which to base a judgment of conviction. (p. 271.)

John A. Bloomington, for the appellant.

Tenney, Coffeen, Harding & Wilkerson, Horace Kent Tenny and James H. Wilkinson, for the appellee.

359 HAND, J. This was a bill in chancery filed in the superior court of Cook county on October 9, 1903, by the Chicago Typothetæ, a voluntary association established for the purpose of advancing and improving the binding and printing business engaged in by its members in the city of Chicago, and for the purpose of employing skilled mechanics whose services might be required by its various members.

for and on behalf of R. R. Donnelly & Sons Company, W. F. Hall Printing Company, Marsh & Grant Company, Faithorn Printing Company, Rogers & Co., S. D. Childs & Co., Jefferson Theatre Program Company, Shea, Smith & Co., and A. R. Barnes & Co., members [360] of said association, against Franklin Union No. 4, its officers and members, praying that an injunction issue restraining said Franklin Union No. 4, its officers and members, from interfering with the business of the members of said association and their employés and persons seeking employment from them.

The bill averred that Franklin Union No. 4, its officers and members, had entered into a conspiracy between themselves and with other unknown persons to prevent the members of said association from carrying on their business, and to effect the object of said conspiracy said Franklin Union No. 4, its officers and members, had inaugurated a strike, and by a systematic course of force and violence, threats, intimidation and picketing, sought to prevent, and were preventing, persons in the employ of the members of said association from longer continuing in their employment and other persons from entering their employment, the effect of which was to injure and destroy the business of the members of said association. The bill, in scope and character and the relief asked, is substantially the same as the bill filed in O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, where many of the questions raised on these appeals are considered and determined adversely to the contention of these appellants.

The defendants were notified of the filing of the bill and the application for an injunction, and on the tenth day of October, 1903, the court issued an injunction restraining Franklin Union No. 4, its officers and the other defendants, among other things, from in any manner interfering with, hindering, obstructing or stopping any of the business of complainants, or their agents or employés, in the operation of their business, or from entering upon the grounds or places where the employés of complainants were at work, for the purpose of interfering with, hindering or obstructing complainants' business in any manner, and also from compelling, or attempting to compel, by threats or intimidation, force or violence, or by unlawful persuasion, any of the employés of [361] complainants to refuse or fail to do their work or discharge their duties as such employés, or by like methods in-

ducing employés to leave the service of complainants, or by like means preventing persons from freely entering into the service and employment of complainants and continuing therein, and also by like unlawful means compelling and inducing, or attempting to compel or induce, the doing of any act in furtherance of the alleged conspiracy, or to interfere with the complainants or their officers or employés in the free, uninterrupted and unhindered control and direction of their business, or from aiding or assisting any others in so doing, and from congregating upon or about the sidewalks, streets, alleys or approaches adjoining or adjacent to the premises occupied by complainants, for the purpose of intimidating the employés of complainants, or preventing them, or any of them, from rendering their services and discharging their duties to complainants, and also from, either singly or in combination with others, collecting in and about the approaches to the factories and places of business of complainants for the purpose of picketing or patrolling or guarding the streets, avenues, gates and approaches and places of business of the complainants, for the purpose of intimidating, threatening and coercing, or unlawfully persuading, any of the complainants' employés, or of preventing persons seeking employment with them from going to and from the places of business of complainants.

In the bill, as originally framed, the members of the Chicago Typothetæ were named, but not as complainants, the averment of the bill being that it was filed by the Chicago Typothetæ for and on behalf of its members, naming them. The members each, however, signed the following statement in writing, immediately following the verification of the bill: "We, the undersigned, members of complainant association, hereto affix our seals and consent and request that action be brought in court by the filing of the foregoing bill of complaint." On the 18th of October, by leave of court and without [362] prejudice to the injunction, which was expressly extended to cover the amended and supplemental bill, an amended and supplemental bill was filed, in which all of the members of said association named in the original bill, and the C. H. Morgan Company, a member of the association, were formally named as complainants.

The immediate cause of the strike inaugurated by Franklin Union No. 4, and its officers and members, was, that a contract had been entered into between the Chicago Typo-

thetæ, on behalf of its members, and the members of Franklin Union No. 4, regulating the hours, wages and terms of employment between the different members of the Chicago Typothetæ and the members of said union. That contract Franklin Union No. 4, by resolution, on September 27, 1903, annulled. The Chicago Typothetæ and its members thereupon refused to further recognize Franklin Union No. 4 or deal with its members as members of said union. Thereafter, and upon the fifth day of October, 1903, a strike was inaugurated by Franklin Union No. 4 against the members of the Chicago Typothetæ. On October 16th a petition was filed in said cause, which was amended on October 21st, representing to the court that John Mucher, Fred Kitchel and Charles Smith had been guilty of a violation of the injunction issued on October 10th. A rule was entered to show cause, the respondents were notified and appeared and filed answers, and upon a hearing they were adjudged guilty of contempt of court, and each was sentenced to imprisonment in the county jail of Cook county for a period of thirty days and to pay a fine of one hundred dollars. On November 2d, a second petition was filed against John Mucher, representing to the court that he had, subsequent to his first conviction, again violated the injunction of October 10th, and a rule was entered to show cause. He was notified and filed an answer and a hearing was had, and he was adjudged to be in contempt of court and was sentenced to imprisonment in the county jail of Cook county for thirty days. On November 20, 1903, a petition was filed [363] against Franklin Union No. 4 and Charles F. Woerner and John M. Shea, respectively president and secretary of Franklin Union No. 4, representing that Franklin Union No. 4 and its said officers had repeatedly violated said injunction of October 10th. The petition was subsequently dismissed as to Woerner and Shea. Franklin Union No. 4 filed an answer and a hearing was had, and the union was adjudged to be in contempt of court and a fine of one thousand dollars was imposed upon Franklin Union No. 4. Several appeals or writs of error were prosecuted or sued out by said respondents to review said judgments of conviction, to the appellate court for the first district, where the cases were heard together and the several judgments of the superior court were affirmed, and several appeals have been prosecuted to this court by said respondents from the judgments of affirmance of the appellate court, and upon motion the cases

have been submitted in this court upon the same briefs and will be considered together and disposed of in one opinion.

A complete record has been filed in the case of Franklin Union No. 4. A short record, containing a copy of the order adjudging the respondent guilty of contempt of court and imposing sentence upon him, and a copy of the appeal bond, are the only matters contained in the record filed in each of the other cases.

Numerous questions have been raised in the brief filed by appellants, some of which are material to a final disposition of the questions raised upon the records filed in the several cases, and several of which, in the manner in which the records have been framed in the cases other than that of Franklin Union No. 4, are not open to review in this court. As the case of Franklin Union No. 4 involves the main points relied upon as grounds of reversal, and there is a complete record filed in that case, as a matter of convenience we will first consider that case, and then dispose of such questions as are not involved in the decision of that case but which are urged as grounds of reversal in the appeals of the individual [364] appellants. In those cases, as the records contain no certificate of evidence, no questions of fact are involved.

The first contention made is, that the court was without jurisdiction, by reason of the want of proper parties, to enter the order of October 10th directing the issuance of said injunction, and for that reason, it is urged, the respondents could not be lawfully adjudged guilty of contempt of court for a violation of the injunction. The bill shows upon its face that the Chicago Typothetæ was not an actual or an artificial person, and had the question of its capacity to sue been raised by a demurrer to the bill or by a motion to dissolve the injunction upon the face of the bill, there would have been some force in the position that the bill was defective for want of proper parties. We think, however, the defect in the bill of want of proper parties apparent only and not real, as it appears upon the face of the bill it was filed in the name of the Chicago Typothetæ for and on behalf of the members of that association, naming them, and the individual members of the association ratified and confirmed the action of the association in filing the bill in its name for and on their behalf, by indorsing upon the bill their individual requests and consents that the bill be filed and action be taken thereon by the court—that is, an injunction for and on their behalf be

issued upon the filing of the bill. The want of capacity to file a bill in chancery by an unincorporated body—a voluntary association—must be taken advantage of by demurrer if the lack of capacity to sue appears upon the face of the bill, and if it does not appear upon the face of the bill the question must be raised by plea, otherwise the want of capacity of such association to sue will be waived and the question of its capacity to sue cannot be raised in this court upon appeal for the first time. "With regard to the proper method of objecting to incapacity of plaintiffs to sue in actions by unincorporated associations the usual rules apply, and such objections may be waived or cured in the usual manner. Thus, where the bill, declaration or complaint shows, upon its face, [365] want of interest or capacity to sue, the proper method of taking advantage of the defect is by demurrer, but where the defect does not thus appear the objection must be raised by plea or answer": 22 Ency. of Pl. & Pr. 238.

In Ada Street Methodist Episcopal Church v. Garnsey, 66 Ill. 132, suit was begun against that church by the name of "The Ada Street Methodist Episcopal Church" instead of against the trustees of said church, and judgment was rendered in favor of the plaintiff. On appeal to this court it was held a suit would not lie against a church organized under the act of 1845, as such, but that the suit should be brought against the trustees of the church, but it was said, as the question was not raised in the lower court it could not be raised in this court on appeal for the first time. On page 134 the court said: "The defendants are not sued as a corporation, but as a church. As a church they cannot sue or be sued. Actions by or against them must be brought by or against the trustees. The defendants, however, failing to take advantage of this objection in the court below, cannot now avail of it here."

If, however, it were conceded that there was a defect of parties, that fact would not have deprived the court of jurisdiction to have heard and decided the questions before it and its order granting the injunction would not have been void, and the respondents could not have justified their acts in violation of the injunction on the ground that there was a defect of parties to the bill. The appellants do not contend, however, that there was a total incapacity upon the part of the complainant named in the bill to sue, but their real contention is that the injunction granted was broader than the

averments of the bill would warrant. They state their own contention in the following manner: "We do not claim a defect in the parties, nor do we urge the incapacity of the parties before the court. We concede that, as far as the Chicago Typothetæ was concerned, the court had plenary powers to act, but having gone outside of the pleadings to
366 bring in complainants, of its own motion, giving them relief which they did not ask, we believe the court acted without jurisdiction and its order in this behalf was void."

The question thus raised was considered by this court in O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108. On page 363 the court said: "The chief argument against the jurisdiction of the court is, that the allegations of the bill of complaint are not sufficient to sustain the prayer of the bill and do not set out specific facts which would give the court jurisdiction—in other words, that the bill would have been obnoxious to a demurrer. It is well settled that jurisdiction does not depend upon the sufficiency of the bill. If the court has jurisdiction of the subject matter and of the parties nothing further is required. The cause of action may be defectively stated, but that does not destroy jurisdiction. A bill may state conclusions, but if not demurred to and the evidence supports a decree conforming to the general allegations of the bill and the decree is within the power of the court to render, the court has jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction: State v. State, 12 Pet. 657, 9 L. ed. 1233; United States v. Arredondo, 6 Pet. 709, 8 L. ed. 554; Grignon v. Astor, 2 How. 338, 11 L. ed. 125; Applegate v. Lexington Min. Co., 117 U. S. 267, 6 Sup. Ct. Rep. 742, 29 L. ed. 892. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs: State v. Wolover, 127 Ind. 306, 26 N. E. 762; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431; Fields v. Maloney, 78 Mo. 172; Dowdy v. Wamble, 110 Mo. 280, 19 S. W. 489. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to

367 decide whether the pleading is good or bad: 1 Elliott's General Practice, sec. 230; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be: Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463; Lane v. Bommelman, 17 Ill. 95; Cody v. Hough, 20 Ill. 43; Iverson v. Loberg, 26 Ill. 179, 79 Am. Dec. 364; Feaster v. Fleming, 56 Ill. 457; Hobson v. Ewan, 62 Ill. 146; Spring v. Kane, 86 Ill. 580; Allman v. Taylor, 101 Ill. 185; St. Louis etc. Coal Co. v. Sandoval Coal etc. Co., 111 Ill. 32; Reid v. Morton, 119 Ill. 118, 6 N. E. 414; Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; State v. McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211."

When a court has before it, as it is conceded the court had in this case, a party complainant asking that an injunction issue, and a party against whom it is asked to issue, upon a bill stating a case falling within its general equitable jurisdiction, the court has jurisdiction to decide whether an injunction should issue or not and the character of the injunction which should issue, and should the court err in ordering an injunction to issue when one ought not to issue, or should it order an injunction broader in its terms than the averments of the bill would justify, its action, on appeal or writ of error, would be set aside; but upon an attachment for contempt, which is in its nature collateral, for a violation of the injunction, a party who has violated the injunction will not be heard to say the injunction ought not to have issued, or was broader in its terms than the bill justified, as an excuse for his action, as the error of the court in granting an injunction or in granting one broader than the averments of the bill will justify does not deprive it of jurisdiction to act, and its order directing the injunction to issue is a valid and binding order until modified or vacated or set aside upon appeal or writ of error.

368 In Board of Supervisors of Iowa County v. Mineral Point R. R. Co., 24 Wis. 93, on page 131, the court said: "The force or efficacy of a decree, as between the parties before the court, does not depend upon the fact that there may be other persons, proper or necessary parties, who are

not before it. The absence of such persons is not a defect involving the jurisdiction or power of the court over the parties who are present or over the subject matter of the suit, so far as those parties may be concerned. The court may, nevertheless, proceed to a decree, and such decree, though rendered in violation of the rules and practice of equity in such cases, is not void as between the parties to it. It is irregular, but not void. It binds the parties to it until set aside or reversed in some direct proceeding for that purpose. And the reason of this is obvious. Jurisdiction exists whenever there is a suit the subject matter of which is cognizable in a court of chancery, and parties are before the court whose rights in relation to such subject matter the court may adjudicate. And the effect of such adjudication between the parties, until reversed or set aside, does not depend upon the fact that the power of the court may have been erroneously exercised in making it. If there be necessary parties wanting, whose absence may render the adjudication fruitless or ineffectual because the rights of such parties cannot be determined, that may be good cause for arresting the proceedings or dismissing the suit but it does not deprive the court of power to proceed."

The jurisdiction of the court does not depend upon the question of the correctness of its order. Jurisdiction is not lost because the court enters an erroneous decree, however erroneous it may be. O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108.

In Tolman v. Jones, 114 Ill. 147, 28 N. E. 464, the court appointed a receiver of the assets of an insolvent corporation and ordered one of the defendants to the bill to assign and turn over to the receiver certain property. The defendant declined to obey the order on the ground it was broader than the court was [369] authorized to make under the averments of the bill, and required him to surrender to the receiver property which was not shown to be the property of the insolvent corporation. The defendant was charged to be in, and was punished for, a contempt of court. He prosecuted an appeal, and on page 154 this court said: "If it be the true construction of the order that it required the assignment of other property than property of the corporation or property alleged as belonging to it, then the order in that respect would be too broad, and wrong. But it does not follow that appel-

lant would be justified in disobeying the order for that reason. That would depend upon whether or not the court had jurisdiction. The principle is of universal force that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous: People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Sullivan v. Judah, 4 Paige, 444; Fennings v. Humphrey, 4 Beav. 1; Chuck v. Cremer, 2 Phill. Ch. 112; Richards v. West, 3 N. J. Eq. 456; Meriam v. Harson, 2 Barb. Ch. 274. This has often been held in reference to disobedience to injunctions, as in the cases above, and the principles which govern cases of contempt for a violation of an injunction order are applicable here."

On the 18th of October an amended and supplemental bill was filed which cured all the defects claimed to exist in the original bill. If the original bill was of such character that there could have been some relief of some kind granted under it, then clearly it could have been amended, and if it could be amended it was not a void bill, and the court did not fail, by reason of the want of parties or otherwise, to obtain, by the filing of the bill, jurisdiction of the parties and the subject matter of the suit for the purpose of making the order of October 10th. A bill which can be amended is not void: Kruse v. Wilson, 79 Ill. 233; Bassett v. Bratton, 86 Ill. 152. The defendants should have applied to the court to modify the injunction, instead of ignoring it, if they were of the opinion it was broader than the averments of the bill [370] authorized. In Tolman v. Jones, 114 Ill. 147, 155, 28 N. E. 464, the court points out the proper practice where the order of the court is broader than the averments of the bill will justify. On that page it is said: "The order, ... at the most, was not wholly void, but only in the particular wherein it is complained of as being too broad. Appellant's proper remedy would have been an application to the court to modify the order in that respect. There was no such application."

We think it is clear, from any view that can be taken of this case, the court had jurisdiction of the parties and of the subject matter of the suit, and that its order of October 10th, granting the injunction, was not void, but was a valid and binding order until modified, set aside or reversed, and that the respondents cannot escape punishment for a violation of the injunction issued in pursuance of that order on the ground

that the court was without jurisdiction to enter it or exceeded its jurisdiction in entering it.

It is next contended that Franklin Union No. 4 cannot be punished for a violation of said injunction, as it is said a corporation can only be punished through its officers, or those acting in aid of it, for a contempt of court. In former times the rule was held to be substantially in accordance with the contention above made, but that doctrine now seems to have been exploded, as all the modern text-writers and adjudicated cases, so far as we have been able to discover, where the question has been fairly presented for consideration or decision, hold that a corporation may be punished for a contempt of court. While by reason of its impersonal nature it cannot be arrested and imprisoned, it may be fined, and the fine collected by sequestration of its property. It is uniformly held that a corporation may be guilty of a crime and punished by a fine, and we have been unable to discover any valid legal reason why it cannot be adjudged guilty of a contempt of court for the willful violation of an injunction and punished by a fine.

371 High, in his work on Injunctions (section 1460), says: "A court of equity has jurisdiction to punish a corporation as well as a private person for contempt in violating an injunction." He cites in support of the text, Mayor v. New York and Staten Island Ferry Co., 64 N. Y. 622. In that case the action of the trial court in imposing a fine upon the defendant railroad company for the violation of an injunction was sustained, and it was in express terms held a defendant corporation would be fined for violating an injunction.

In American and English Encyclopedia of Law (volume 7, second edition, page 847), it is said: "Formerly it was thought that a corporation could not be held liable for contempt, as, by reason of its impersonal nature, it could not be attached. And there are dicta to this effect in some of the late cases. The weight of modern authority, however, is against this doctrine. While a corporation cannot be attached or imprisoned, it may nevertheless be guilty of contempt in disobeying or violating an order or decree of court, as it may be guilty of a tort or crime, and it may be fined therefor and its property sequestered."

In volume 10 of the Cyclopedia of Law and Procedure (page 1235) the author of the article on Corporations an-

nounces the law upon the subject in the following language: "There are early decisions to the effect that a corporation cannot be attached for a contempt of court committed in refusing to obey its order or judgment. This is obvious when it is considered that the corporation is intangible and has no body that can be arrested or taken by attachment or execution, and that the only means of compelling the attendance of a corporation in a court of justice at common law was by a distraint of its lands or goods. But we may easily conclude, both upon principle and modern authority, that a corporation may be punished for those contempts which consist in the disobedience of the judgments, decrees or orders of a court of justice made in a case within its jurisdiction."

372 Rapalje, in his work on Contempts (sections 1, 48), thus states the general rule: "It is conclusively settled by a long line of decisions that at common law all courts of record have an inherent power to punish contempts committed in facie curiæ, such power being essential to the very existence of the court as such, and granted as a necessary incident in establishing a tribunal as a court. And this power extends to the punishment of willful contempts committed by corporate bodies as well as by individuals."

In Re Western Marine etc. Ins. Co., 38 Ill. 289, Mr. Justice Lawrence, in discussing the powers of a court of chancery to control a depositary of the court funds, on page 290 said: "When a court makes an order appointing a particular person a depositary of the court funds, and such person, knowing of such order, accepts the deposit, he unquestionably becomes, pro hac vice, an officer of the court. The court may order him to refund the money, and if he fails to do so, without showing some valid reason, may proceed against him as for a contempt. The same rule would apply to a corporation, and if its officers having control of its funds, and having the means of payment, belonging to the corporation, in their hands, should refuse to pay, they, too, might be proceeded against as for a contempt."

From a consideration of the authorities and the principles which control courts of chancery in the enforcement of their decrees we are clear that the courts of this state have power to adjudge a corporation, other than a municipal corporation, guilty of contempt for the willful violation of an injunction, and that such corporation may be punished by fine upon being adjudged guilty of a contempt of court.

The case of Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606, relied upon as sustaining a conclusion different from that at which we have arrived, is not in point. In that case the proceedings were against an officer of the corporation, and what was said in the case with reference to punishing a corporation for contempt of court was not necessary to be said in deciding [373] the questions then before the court. And the case of Hughson v. People, 91 Ill. App. 396, also cited by appellants, was a proceeding against an officer of the corporation, and not against the corporation. These cases, when properly understood, are not in conflict with the general current of modern authority upon the question now under consideration.

It is further contended that the evidence does not show Franklin Union No. 4 to have been guilty of a violation of said injunction, and that the court erred in adjudging it to be guilty of contempt. It appears that on the twenty-seventh day of September, 1903, a meeting of the members of Franklin Union No. 4 was held at Bricklayers' Hall, in the city of Chicago; that the meeting was called to order by the president of the union; that Gorf, McCabe, Gondeck, Boettger, Mansfield and Kavanagh were appointed as assistant sergeants-at-arms; that four hundred and seventy-eight members out of four hundred and eighty members present voted to adopt the following resolution:

"Chicago, September 27, 1903.

"At a special meeting of the Franklin Union, held at Bricklayers' Hall, Sunday, September 27, 1903, the following resolutions were unanimously adopted:

"Whereas, on or about January, 1902, a preliminary agreement was presented to Franklin Union by the Chicago Typothetæ, which provided, among other things, that said agreement should become operative when duly signed by the various firms composing the said Chicago Typothetæ; and whereas, this agreement was concurred in by Franklin Union merely as a tentative agreement, with the express understanding that it become operative only with such firms as desired to become parties to the same by making individual agreements with Franklin Union; and whereas, we have waited about two years and have failed to obtain even one of the individual agreements above referred to; and whereas, the Chicago Typothetæ, and the firms composing the same, have evinced unusual care-

lessness and indifference in this matter and have shown no disposition to perfect the tentative agreement, as aforesaid:

"*Be it therefore resolved,* That Chicago Franklin Union does hereby declare the aforesaid tentative agreement as null and void.

"*Be it further resolved,* That the Chicago Typothetæ be immediately notified of this action.

374 "*Fifth*—That in the event the present demand for higher wages terminates in a strike, that no strike benefits be paid for the first week of the strike.

"*Sixth*—That the strike benefit be limited to $5 per week for single men and $7 per week for married men.

"*Seventh*—The levy of a special assessment of $2 a week, the same to continue during the entire strike, until suspended by act of the union, and to be levied on the entire membership who are employed. Those on a strike to be excused during the term they are on strike, but the assessment to be enforced as soon as they secure work.

"*Eighth*—That suitable headquarters be engaged on the south and west sides for the purpose of transacting the business of the union in regard to the strike.

"*Ninth*—That two committees, of three members each, be appointed to act in the capacity of a visiting committee for the purpose of visiting the various employers; and further, the members of the visiting committee receive the sum of $2.50 per day for each day's time lost.

"*Tenth*—That the scale take effect on and after Monday, October 5, 1903."

—that after the adoption of the resolution, on motion, the president appointed a strike committee, a conference committee and a visiting committee; that Franklin Union No. 4 at that time had a membership of about eighteen hundred; that about two hundred of its members went out on the strike inaugurated October 5th; that Franklin Union No. 4 established headquarters, pursuant to the resolution of September 27, at No. 14 Custom House place, which was situated in the vicinity of the business places of the members of the Chicago Typothetæ; that girls and unmarried men, members of the union, received five dollars per week, and married men, members of the union, received seven dollars and fifty cents per week each, while on the strike, as strike benefits; that each member of the union not on the strike paid an assessment of two dollars per week to Franklin Union

No. 4, which was to continue during the strike; that the members out on the strike were excused from paying said assessment while on the strike, but the assessment was to be collected so soon as they were at work; that the strike benefits were paid to the strikers by the secretary of Franklin Union No. 4 at its headquarters at 14 Custom House place; [375] that when the appellants John Mucher, Fred Kitchel and Charles Smith, and others, all members of Franklin Union No. 4, with the exception of John Mucher, were on trial for having violated said injunction, the president and secretary of Franklin Union No. 4 were present and they were each defended by the regular attorney of the union; that Kavanagh, an assistant sergeant-at-arms of Franklin Union No. 4, was on the picket line and assaulted employés of the members of the association several times; that members of the visiting committee of Franklin Union No. 4 called at the homes of the employés of members of the association and sought to persuade or hire said employés to leave the employment of members of the association; that other employés of the members of the association were taken to the headquarters at 14 Custom House place by members of said Franklin Union No. 4, where they were offered or paid money on condition they would quit the employment of the members of the association; that members of Franklin Union No. 4 followed young women in the employ of members of the association from the buildings where they were employed, to the street or elevated cars, went into the cars, continually watched them, and when the young women left the cars followed them to their homes; that when men or women employés of the members of the association were on the street on their way to and from their homes or places of employment, they were stopped near the union headquarters by members of the union, who by threats and by calling them opprobrious and insulting names sought to force them to leave the employment of members of the association; that more than twenty-five specific assaults were made by members of Franklin Union No. 4 upon employés of the members of the association within a few hundred feet of the door of the headquarters of the union at 14 Custom House place within two weeks of the time the strike was inaugurated; that in several instances men and women in the employ of members of the association, while in the vicinity of the place [376] of their employment upon the public streets of the city, were knocked down and beaten by members of

the union; that persons in the employ of the association were assaulted and beaten by members of Franklin Union No. 4 upon the public streets, while in the vicinity of the headquarters of the union, when on their way to and from their homes, and even while under the escort of a policeman; that members of Franklin Union No. 4, singly, in pairs and in large numbers, congregated on the public streets and in the public alleys near the approaches to the places of business of the members of the association for the purpose of picketing, and when the employés of the members of the association, or persons seeking employment of them, approached the business places of the members of the association, by threats, and often by violence, the members of Franklin Union No. 4, while thus picketing, sought to induce and prevent such persons from remaining in the employ of the members of the association or from accepting employment of the members of the association. The charge in the bill against Franklin Union No. 4, its officers and members, was that said Franklin Union No. 4, its officers and members, had conspired together to do an unlawful act, by agreeing together to prevent the members of said Chicago Typothetæ from carrying on their business, and that in furtherance of said conspiracy they had inaugurated a strike, and by a systematic course of force and violence, threats, intimidation and picketing they sought to prevent, and were preventing, persons in the employ of the members of said association from longer continuing in their employment and other persons from entering their employment.

A conspiracy at common law may be defined, in short, as an agreement or combination formed between two or more persons to do an unlawful act or to do a lawful act by unlawful means: Smith v. People, 25 Ill. 9. The gravamen of the offense is the combination (People v. Sheldon, 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785, 23 L. R. A. 221), and a combination may amount to a conspiracy although [377] its object be to do an act which, if done by an individual, would not be an unlawful act: Chicago etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770. And the agreement or combination need not be evidenced by a writing. It may be a verbal agreement or undertaking or a scheme evidenced by the action of the parties: Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738. The law is well settled that when a conspiracy is once entered into, each conspirator then becomes liable for all the acts of his

co-conspirators done in furtherance of the objects of the conspiracy. In Lasher v. Littell, 202 Ill. 551, 67 N. E. 372, on page 555, the court said: "The conspiracy being established, everything said, written or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them and may be proved against each." And in Chicago etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, on page 452, that "after an unlawful combination is formed, the acts of the different parties to the combination which tend to further its purposes bind all parties to the combination."

It will be readily conceded by all that labor has the right to organize as well as capital, and that the members of Franklin Union No. 4 had the same legal right to organize said union as the members of the Chicago Typothetæ had to form that association, and that the members of Franklin Union No. 4 had the legal right to quit the employment, either singly or in a body, of the members of said association, with or without cause, if they saw fit, without rendering themselves amenable to the charge of conspiracy, and that the courts would not have been authorized to enjoin them from so doing, even though their leaving the employment of the members of the association involved a breach of a contract. While such is the law, it is equally true that, upon the members of Franklin Union No. 4, either singly or in a body, leaving the employment of the Chicago Typothetæ, the members of the association had the right to employ other persons in
378 their places, and when Franklin Union No. 4, its officers and members, agreed together that by calling a strike, and by force, threats, intimidation and picketing, they would prevent the members of said association from employing other persons in their places, then they entered upon an unlawful undertaking, the carrying into effect of which might be enjoined by a court of chancery. In O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, upon page 373, it was said: "There can be no doubt that any attempt to coerce the Kellogg Switchboard and Supply Company into signing said agreement by threats to order a strike was unlawful. It was violative of the clear legal right of the company, and was unjust and oppressive as to those who did not belong to the labor organizations. Nevertheless the strike was ordered, and thereafter the plaintiffs in error sought by threats, intimidation and violence to prevent men and women from taking the

places of the strikers.'' And in Mathews v. People, 202 Ill. 389, 95 Am. St. Rep. 241, 67 N. E. 28, 63 L. R. A. 73, on page 401, it was said: ''An employer whose workmen have left him and gone upon a strike, particularly when they have done so without any justifiable cause, is entitled to contract with other laborers or workmen to fill the places of those who have left him. Any workman seeking work has a right to make a contract with such an employer to work for him in the place of any one of the men who have left him to go out upon a strike. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate section 2 of article 2 of the constitution of Illinois, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' It is equally a violation of the fifth and fourteenth amendments of the constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law, and that no state shall deprive any person of life, liberty or property without due process of law, [379] 'nor deny to any person within its jurisdiction the equal protection of the laws.' ''

It appears that the strike was inaugurated by Franklin Union No. 4; that it provided a place in which the strikers might congregate near the business places of the members of the Chicago Typothetæ; that it raised a fund by assessing the members of the union that did not go out upon the strike; that said fund was used by it to maintain its members who did go out, while they were engaged in the strike; that its regular committees actively sought to induce persons in the employ of members of the Chicago Typothetæ, or who sought employment from them, not to remain in their employ or not to accept employment from them, and that many of its members were actively engaged in picketing and in the use of force and intimidation against the employés of the members of the association or persons seeking employment from them. It is clear that the violence, force, threats, intimidation and coercion which immediately followed the inauguration of the strike on October 5th, in the vicinity of the headquarters of Franklin Union No. 4 and the business places of the members of the Chicago Typothetæ, were the direct result of the action of Franklin Union No. 4 at the meeting of Sep-

tember 27th, and of the action of the union and its officers thereafter, and the results which followed were those which Franklin Union No. 4, and its officers, were bound, in law, to know would likely follow their action in inaugurating and carrying on what counsel characterize as an industrial war, and Franklin Union No. 4 having set in motion the force which produced the results pointed out, cannot excuse itself for the part it took in the conspiracy by the statement of its officers that they advised the members of the union to be orderly and to obey the law. The citizen, when engaged in lawful pursuits, must be accorded the right to walk the public streets of our cities and our country highways in absolute security and to go to and return from his home and place of business or employment without being interfered with. To [380] follow him, to spy after him, to stop him and threaten him, to put him in fear, to intimidate him or to coerce him are alike unlawful. Intimidation and coercion are relative terms. What would put in fear a timid girl or weak woman or man might not terrorize the strong and resolute. All are alike entitled to the protection of the law: Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407; Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722.

In Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, on page 614, it was said: "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. And: "It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss."

In Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13, 42 L. R. A. 407, on page 520, it was said: "To picket complainants' premises in order to intercept their teamsters or persons going there to

trade is unlawful. It, itself, is an act of intimidation and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done ten or ten hundred feet away."

And in Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 107, 35 L. R. A. 722, on page 97, it was said: "The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful [381] harm, and persuasion to break existing contracts. It was thus one means of intimidation indirectly to the plaintiff, and directly to persons actually employed or seeking to be employed by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them."

The strong arm of the law would be short, indeed, if a member of Franklin Union No. 4, who was guilty of using violence, force, threats and intimidation, can alone be punished, and the corporation—the organized entity—which organized the strike, furnished the money to maintain it, and molded, shaped and conducted it, through its officers, from regular headquarters maintained by it, cannot be reached and punished for the force, violence, threats and intimidation which naturally would, and did, flow from the unlawful acts which it has instigated its members to commit. We think the evidence clear and unequivocal that Franklin Union No. 4 was a party to the conspiracy alleged in the bill to exist, and that it was properly found guilty of a violation of the injunction.

It is further urged that the court erred in reserving for future consideration the question whether the whole or any part of the fine assessed against Franklin Union No. 4, when collected, should be paid to the complainants for their damages and expenses. If the court hereafter should adjudge

that said fine, or any part thereof, should be so applied, it will then be time enough for Franklin Union No. 4 to object to its application in that manner. That portion of the order is interlocutory and not now subject to review in this court, and for that reason we express no opinion upon the [382] question as to the power of the court, after the fine is collected, to direct the payment of the whole or any portion thereof to the complainants in satisfaction of their damages or expenses.

It is next urged that it does not appear that the members of the Chicago Typothetæ have been damaged by the action of Franklin Union No. 4. The bill sets up a state of facts which, if true, conclusively shows that if the business of the members of the Chicago Typothetæ was broken up by said Franklin Union No. 4, its officers and members, inducing the employés of the members of said association to abandon their employment and by preventing other persons from entering their employment, the members of said association would suffer irreparable injury. The truthfulness of this averment of the bill cannot be questioned in this proceeding. Nor do we think the fine imposed upon Franklin Union No. 4 of one thousand dollars, excessive. The violation of the injunction was flagrant and often repeated, and the imposition of a nominal fine would not have been an adequate punishment of Franklin Union No. 4 or a vindication of the law.

It is also said that the petition upon which Franklin Union No. 4 was adjudged to be guilty of contempt was insufficient. It was not necessary that a petition be filed—an affidavit would have been sufficient. In O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, on page 368, the court said, in speaking of the contention that the petition filed against the respondents, and upon which they were adjudged guilty of contempt, was insufficient: "They were not entitled to a specific bill of particulars, nor was it necessary to set out the charge with the same particularity that would be required of an indictment: 1 Bishop on Criminal Procedure, sec. 643. It has often been held that in an attachment proceeding for contempt, alleged to have been committed out of the presence of the court, it should be brought to the attention of the court by an affidavit setting out the particular respects in which the injunction is alleged to have been violated. But that was sufficiently done in this [383] case: 4 Ency. of Pl. & Pr. 776, 780; People v. Diedrich, 141 Ill. 665, 30 N. E. 1038; Oster v. People, 192 Ill. 473, 61 N. E. 459, 56

L. R. A. 462." The petition filed against Franklin Union No. 4 fully advised it of the charge made against it, and was sufficient.

It is further said the order adjudging Franklin Union No. 4 guilty of contempt was insufficient. The order referred to the petition and the affidavits filed in its support, and in apt terms adjudged Franklin Union No. 4 guilty of a violation of the injunction, setting out the manner of its violation and adjudging it to be in contempt, and imposed upon it a fine of one thousand dollars. In Fischer v. Hayes, 19 Blatchf. 13, 6 Fed. 63, Mr. Justice Blatchford says (page 70): "It is objected that the order of February 17, 1880, decrees only 'that the defendant is adjudged to have committed the contempt alleged,' without reciting further the offense of which he is guilty. It is insisted that this was necessary, and further, that the order should have recited that the defendant had disobeyed a lawful order of the court and was guilty of a contempt of court in so doing. The contempt alleged is set forth with sufficient particularity in the affidavits on which the motion for attachment was founded and in the report of the referee. All the proceedings and the various orders are sufficiently connected together by reference and recital to identify 'the contempt alleged,' without the necessity of reciting at length in the order the particulars of the previous proceedings." We think the order adjudging Franklin Union No. 4 guilty of contempt and assessing the fine against it of one thousand dollars sufficient.

It is next urged on behalf of the appellants John Mucher, Fred Kitchel and Charles Smith, that the evidence not having been preserved by bill of exceptions and incorporated in the records filed in their several appeals, the findings incorporated in the orders adjudging them guilty of contempt were not sufficient upon which to base a sentence. These records contain only copies of the order and appeal bond, and from the clerk's certificate attached to each record we are unable to determine whether the evidence in each case was preserved 384 by bill of exceptions or not. In Day v. Davis, 213 Ill. 53, 72 N. E. 682, this court held (page 55): "While it was not the duty of the plaintiff in error to see that the oral proof was preserved either by a certificate of evidence or by a recital of findings in the decree, it was his duty to bring before us all that is in the record on that point before he can ask us to declare that the chancellor erred in ordering that the prop-

erty should be sold. If we had a complete record of the cause before us and it should not appear from it that the oral evidence had been preserved, then, unless the decree contained recitals of findings of fact sufficient to sustain the relief granted, the plaintiff in error might insist upon a reversal. In the absence of a complete record no presumption of error obtains but the presumptions are in favor of regular and correct action on the part of the chancellor." In view of the above holding, the individual appellants, in the absence of a certificate of the clerk that they have filed a complete record, cannot raise the question that the recitals found in the several orders appealed from are not sufficient upon which to base a judgment of conviction.

Other grounds of reversal have been urged. They are, however, extremely technical in character and without merit.

Finding no reversible error in the several records involved in the several appeals here considered, the judgments of the appellate court in all of said cases will be affirmed.

Justices Boggs and Scott Dissented from the majority of the court, and in their dissenting opinion said in part:

"The injunction in this cause restrains the defendants, among other things, from inducing by unlawful persuasion any of the employés of the complainants to leave the service of the complainants, and from attempting to prevent others by unlawful persuasion from freely entering the service or continuing in the service of the complainants. The term 'unlawful persuasion' has no established meaning in the law. Appellees contend that all persuasion is unlawful. If such was the view of the chancellor who granted the writ, the word 'unlawful' should have been omitted; while if, in his view, there is persuasion of two kinds—namely, lawful and unlawful—the injunction should have more specifically described the persuasion from which the defendants must refrain, so that it would not have been left to each to determine for himself, at his own peril, what was lawful and what was unlawful. The purpose of the injunction is to advise the defendants what particular acts the court has decided they may not lawfully do. It would seem upon reason, however, that when the argument addressed by the striker to a workman for the purpose of inducing him to leave or refrain from entering a certain employment becomes unlawful, it passes from the domain of persuasion into that of coercion, threat or intimidation.

"Having this right of persuasion, it was proper for the strikers to exercise it by accosting in a respectful manner the person whom they desired to address, and they might peaceably, by explanation, argument, entreaty, and reason, seek to persuade such person to leave the employment in question, and the strikers might lawfully do

this in the public highway or street so long as they do not obstruct public travel, or at the home of the person they sought to interview, or at any other place where they would have a right to talk with that person about any other legitimate business.

"In the case of Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, there was no question before the court in reference to the right of a striker to induce another to leave or refuse to enter the service of an employer, and what is there said in reference to persuasion is for that reason inapplicable in this cause.

"The principle governing such cases as the Doremus case, in which interference with contract relations has been held unlawful, stands upon a peculiar ground and does not obtain here: 18 Am. & Eng. Ency. of Law, 2d ed., 87.

"The only case prior to the present one in a court of appellate jurisdiction in this state where the question of persuasion has been squarely before the court was the case of Beaton v. Tarrant, 102 Ill. App. 124, where the right of striking workmen to use the streets and highways in a manner not inconsistent with public travel, for the purpose of inducing others, by entreaty, argument and peaceable persuasion, in good faith, to leave or refrain from entering the service of the late employer of the strikers is expressly recognized. To the same effect are the following authorities: 18 Am. & Eng. Ency. of Law, 2d ed., 87; American Steel etc. Co. v. W. D. Union, 90 Fed. 608; Cumberland Glass Mfg. Co. v. Glassblowers' Assn., 59 N. J. Eq. 49, 46 Atl. 208; Krebs v. Rosenstein, 31 Misc. Rep. 661, 66 N. Y. Supp. 42; Rogers v. Evarts, 17 N. Y. Supp. 264; People v. Kostka, 4 N. Y. Crim. 429; Master Brewers' Assn. v. Damascio, 16 Colo. App. 25, 63 Pac. 782; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310, 25 L. R. A. 414; United States v. Kane, 23 Fed. 748; Union Pacific Ry. Co. v. Ruef, 120 Fed. 102; Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264. Nor does the fact that the strikers' organization offers to pay the employé whom they desire to have leave the employment for the time he may be out of work render the persuasion wrongful: Cumberland Glass Mfg. Co. v. Glassblowers' Assn., 59 N. J. Eq. 49, 46 Atl. 208; Rogers v. Evarts, 17 N. Y. Supp. 264; Levy v. Rosenstein, 66 N. Y. Supp. 101.

"It is urged by appellees, however, that persuasion necessarily and inevitably leads to disagreements, quarrels, force, violence and general disorder, and should therefore be enjoined. Affidavits filed by appellees themselves in this cause show that this statement of fact is not accurate, and their conclusion does not follow. The question is not whether persuasion leads to acts of lawlessness, but whether persuasion, in itself, is unlawful. A man should not be enjoined from doing an act merely because that act may lead to the doing of some wrongful act. If such an argument be followed to its logical conclusion, it would be proper to enjoin the strikers from leaving their homes while the strike continues, because if they are kept at

home no violent encounters will take place between them and those who are in the employment in question, while if they are permitted to go upon the streets affrays may occur. The law will be satisfied if the striker be punished when he does a wrongful act. It is not just to punish him for doing an act rightful in itself merely because that act may lead to something wrongful.

"Appellees misapprehend the effect of the case of London Guarantee etc. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526. The precise question determined in that cause is shown by the conclusion of the court which appears in the opinion on pages 507 and 508. In that case, however, the statement from the opinion in Quinn v. Leathem, [1901] App. Cas. 495, to the effect that 'it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference,' was quoted, and this court said in reference thereto: 'We are of opinion that the contention of the appellant in the case at bar, to the effect that competition in trade, employment or business is such a justification, is in accord with the authorities.' In the case now before us, the purpose of the strikers was to rid themselves of competition in employment by causing those who worked in the places they had left to leave the employment, that the strikers might be reemployed under more favorable conditions than those formerly obtaining.

"An order punishing Franklin Union No. 4 should not have been entered, unless the evidence offered was sufficient to establish its guilt beyond a reasonable doubt. The complainants sought to sustain their contention almost entirely by affidavits. Some of these affidavits contained direct and positive averments of wrongs done by certain of the strikers, but many of them contained conclusions of the affiants, statements on information and belief, and statements made upon hearsay, so intermingled with such statements of material fact as were found in the affidavits as to make it impossible to separate that which was legitimate evidence from that which should not be considered. Ex parte affidavits, such as these, are the weakest and most unsatisfactory evidence: Pittsburg Appeal, 79 Pa. St. 317; State v. Mickle, 25 Utah, 179, 95 Am. St. Rep. 845, 70 Pac. 856, 60 L. R. A. 468; Fullenweider v. Swing, 30 Kan. 15, 1 Pac. 300; Hat Sweat Mfg. Co. v. Davis Sewing Machine Co., 32 Fed. 401; Vaughn v. Hann, 6 B. Mon. 338.

"In Becker v. Quigg, 54 Ill. 390, it is said (page 394): 'One serious objection to the admission of ex parte affidavits is, that the opposing party is denied the privilege of cross-examination. This is a most efficacious test for the discovery of truth, and should never be departed from except from actual necessity. A witness subjected to this test cannot easily impose on the court or fabricate falsehood.'

"Again, such affidavits are frequently in the language of the draughtsman rather than in that of the witness, and for this reason

it is impossible to know from the affidavit precisely what the witness intended to say.

"In our judgment, in cases of this kind the better practice requires that the defendants be confronted by the witnesses for complainants in open court, where cross-examination may be had, and that the same course be pursued with reference to those witnesses who speak in behalf of defendants.

"Franklin Union No. 4 has eighteen hundred members; but two hundred of them were involved in the strike. It would seem that the remaining sixteen hundred, at least, should not be punished by a fine inflicted upon the union to which they belong, when they have never in any way, by the union or by any executive or other controlling body or officer thereof, countenanced or shown approval of any acts in violation of the writ.

"We are also of the opinion that the order, in reserving for determination, after the fine should be collected, the question of paying the amount, or a part thereof, to the complainants for their costs and expenses, was erroneous, first, because there is no statute in Illinois that affords any warrant for collecting damages and expenses in this way in this suit, and fines for contempt can be so applied only when authorized by statute in cases of this character; and second, because an order punishing for contempt must be specific, certain and final: People v. Pirfenbrink, 96 Ill. 68; State v. Voss, 80 Iowa, 467, 45 N. W. 898, 8 L. R. A. 767.

"The evidence does not show that Franklin Union No. 4, in its corporate capacity, entered into a combination with any other person or persons to do an unlawful act or to do a lawful act by unlawful means, or that it did anything in violation of the commands of the writ, and for this reason the judgment as to Franklin Union No. 4 should be reversed."

Strikes and Strikers are discussed in the monographic note to O'Neill v. Behanna, 61 Am. St. Rep. 706-711. This subject is further discussed with special reference to boycotting in the monographic note to Gray v. Building Trades Council, 103 Am. St. Rep. 488-503, and with special reference to conspiracy in the recent case of Purrington v. Hinchliff, 219 Ill. 159, 109 Am. Rep. 322, and cases cited in the cross-reference note thereto. And even if the terms of an injunction are broader than the allegations of the bill therefor, that fact is no defense in a proceeding to punish for contempt in violating the injunction: O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219.

When an Injunction is issued by a court having jurisdiction to award it, the person against whom it is issued is bound to obey it until it is vacated or dissolved, notwithstanding it may have been error to award it: State v. Frealock, 52 W. Va. 232, 94 Am. St. Rep. 932.

A Corporation May be Held Answerable for a criminal contempt of court: Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 70 Am. St. Rep. 280. Compare Sercomb v. Catlin, 128 Ill. 556, 15 Am. St. Rep. 147.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

HAMPEL v. DETROIT, GRAND RAPIDS AND WESTERN RAILROAD COMPANY.

[138 Mich. 1, 100 N. W. 1002.]

NEGLIGENCE of Driver not Imputed to Infant.—The negligence of the driver of a vehicle is not imputable to a minor riding with him at his invitation, so as to bar an action against a railroad company for her negligent killing at a crossing. (p. 277.)

Joseph Barton and Walter W. Drew, for the appellant.

Frederick W. Stevens and Charles McPherson, for the appellee.

[1] HOOKER, J. August 23, 1899, Amelia Drager, who would have been fourteen years old had she lived until the third day of the following October, was killed by one of defendant's [2] trains at a highway crossing. In December, 1901, this suit was commenced. No witnesses were sworn on the part of the defendant. After all the witnesses were sworn on the part of the plaintiff, the circuit judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The accident occurred near Beghold's mill, which stands about seventy-five feet north of the highway and forty feet east of the railway track. At this point the railway track runs north and south and the highway east and west. On the south of the highway, and west of the track, was a large pile of wood, partly on the railroad right of way and partly in the highway. It was six to eight feet high, and obscured the view of the train coming from the south when one was traveling the highway from the west, though one could see the

smoke from an approaching locomotive. The girl and her sister lived a half mile west of the crossing. Nine months in the year she attended school. To reach the schoolhouse, she crossed the railroad track. The school building was east of the track. Upon the day of the accident she and her sister were going east from home, carrying a bundle. John Fenning, who was driving a single horse before a buggy, overtook them, and invited them to ride. They accepted the invitation. The record discloses that, just before getting to the wood pile, Fenning looked for a train, and, seeing none, continued to travel toward the crossing, paying no further attention to the railroad, or to the trains that might be approaching. This was doubtless because, as he expressed it, he did not know any train was due. When the horse got within a few feet of the track, a train appeared, the horse turned to the left and reared, and the wheel of the buggy struck a log which projected into the highway about four feet. The inmates of the buggy were thrown toward the train, and Miss Drager was killed.

It is claimed no signals were given for the crossing. The testimony of the witnesses for the plaintiff is contradictory upon that point, one of them swearing she heard [3] the whistle; and, were it not for other questions in the case, the testimony as to whether the signals were given should have been submitted to the jury as a question of fact. An important question in the case is whether Mr. Fenning was negligent in approaching the crossing as he did.

It would not profit anyone to set out the testimony in detail, but the proof is overwhelming that he was so negligent that, if he was suing for damages, it would have been the duty of the judge to direct a verdict in favor of the defendant: See Lake Shore etc. R. Co. v. Miller, 25 Mich. 274, and notes, and the many cases cited there; Freeman v. Duluth etc. Ry. Co., 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; Grostick v. Detroit etc. R. R. Co., 90 Mich. 594, 51 N. W. 667; Gardner v. Detroit etc. R. R. Co., 97 Mich. 240, 56 N. W. 603, and the cases there cited; Stewart v. Michigan Cent. R. R. Co., 119 Mich. 91, 77 N. W. 643; Britton v. Michigan Cent. R. R. Co., 122 Mich. 359, 81 N. W. 253.

The next question of importance is whether the negligence of the driver is imputable to the plaintiff's intestate. Plaintiff's counsel concede that, had she been an adult, it would be, but earnestly and ably contend that, as she was an infant, she

should not be charged with the negligence of the driver. It is urged that the doctrine of negligence rests upon the assumption that the relation of principal and agent or master and servant exists between the passenger and driver, and that, as an infant can be neither principal nor master, the doctrine cannot apply to an infant. The deceased was an infant thirteen years old, in a carriage by invitation of its driver, through whose negligence, and without her fault, she was killed. Had she been an adult, his negligence would have been imputable to her, upon the fiction that he was her agent, under the doctrine of Thorogood v. Bryan, 8 Com. B. 115, which is recognized as authority in this state: See Mullen v. City of Owosso, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 663, 23 L. R. A. 693. But this infant lacked the capacity to make him her agent, while there is not the least substance of a claim that either party supposed that such relation existed as a matter of fact.

It is said that the case is covered by Apsey v. Detroit etc. R. R. [4] Co., 83 Mich. 432, 47 N. W. 319. The question of imputed negligence is not discussed in that case. It may be inferred that it was not raised. The decision in Mullen v. City of Owosso, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 663, 23 L. R. A. 693, was carefully limited to cases of adults by the writer of the opinion, who participated in the decision of the Apsey case. In some jurisdictions the negligence of parents is imputable to children. Whatever the rule in this state may be as to children of very tender years, having no capacity to care for themselves, that doctrine is not sustained as to infants generally: See Fye v. Chapin, 121 Mich. 679, 80 N. W. 797, citing Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584, and Mullen v. City of Owosso, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 663, 23 L. R. A. 693. Here no question of the parents' negligence is raised, as in the Apsey case; but, if a child is chargeable with its parents' negligence, does it follow that he should be held responsible for that of strangers at whose invitation he rides? The doctrine is at variance with the overwhelming weight of authority here and in England. If the case of Apsey v. Detroit etc. R. R. Co., 83 Mich. 432, 47 N. W. 319, must be considered an authority for the proposition that the negligence of a driver is imputable to an infant, it should be overruled.

It is said the defendant was guilty of gross negligence, and the question of contributory negligence becomes immaterial.

There is nothing in the record to indicate the case comes within the holdings of this court as to what constituted gross negligence: See Schindler v. Milwaukee etc. Ry. Co., 87 Mich. 411, 49 N. W. 670; Buckley v. Flint etc. R. R. Co., 119 Mich. 583, 78 N. W. 655; Labarge v. Pere Marquette R. R. Co., 134 Mich. 139, 95 N. W. 1073.

Judgment is reversed, and a new trial ordered.

Moore, C. J., and Carpenter and Montgomery, JJ., concurred.

Grant, J., did not sit.

IMPUTED NEGLIGENCE.

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I. General Scope and Basis of Doctrine.

a. Repudiation in Some Jurisdictions.—The doctrine that the negligence of one person contributing to the injury of another is imputable to the latter so that he cannot maintain an action for damages against a third person whose wrong or negligence caused the injury has been, except in a limited class of cases hereinafter noted, repudiated by many, and probably most, of the courts of this country: Hajsek v. Chicago etc. R. R. Co., 68 Neb. 539, 94 N. W. 609; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350. Yet, as will be seen in the consideration of this question to follow, a few courts tenaciously and unreasonably cling to such phases of the doctrine as that a parent's negligence is chargeable to his child, and a driver's to his guest or passenger.

b. Relation of the Persons Involved.—The generally accepted view, however, is that contributory negligence, in order to defeat a recovery for injuries received on account of the negligence of another, must consist of some act or omission on the part of the person injured, or of some third person to whom he bears a relation of master or superior, or some relation akin thereto: East Tennessee etc. Ry. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; Consolidated Gas Co. v. Getty, 96 Md. 683, 94 Am. St. Rep. 603, 54 Atl. 660; Cincinnati St. Ry. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340. Said Justice Field: "That one cannot recover damages for an injury to the commission of which he has directly contributed, is a rule of established law and a principle of common justice; and it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person toward whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it": Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652. "Unless the person guilty of negligence is the agent, servant, or partner of the person injured, his delinquency cannot be imputed to the latter": Hajsek v. Chicago etc. R. R. Co., 68 Neb. 539, 94 N. W. 609.

c. Gross or Willful Negligence.—A defendant who has been guilty of gross, wanton, or willful negligence in causing an injury, or who

might have avoided an injury notwithstanding the contributory negligence of another, cannot invoke the doctrine of imputed negligence: Pratt Coal etc. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555; Schindler v. Milwaukee etc. Ry. Co., 87 Mich. 400, 49 N. W. 670. This is but an extension of the general rule that the contributory negligence of an injured person is no bar to the right to recover damages, if the person inflicting the injury might have avoided so doing, notwithstanding such contributory negligence, or if he inflicted the injury intentionally, wantonly, recklessly, or maliciously: Fox v. Oakland etc. Ry., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; Lake Shore etc. Ry. Co. v. Bodemer, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; Florida etc. Ry. Co. v. Hirst, 30 Fla. 1, 32 Am. St. Rep. 17, 11 South. 506, 16 L. R. A. 631; Deans v. Wilmington etc. R. R. Co., 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77.

II. Persons Engaged in Joint Enterprise.

a. In General—Persons in Vehicle.—If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to the others: Nesbit v. Town of Garner, 75 Iowa, 314, 9 Am. St. Rep. 486, 39 N. W. 516, 1 L. R. A. 152; Koplitz v. St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74. Two persons engaged in moving furniture were held to be engaged in a joint enterprise in Schron v. Staten Island etc. R. R. Co., 16 App. Div. 111, 45 N. Y. Supp. 124, so that the negligence of one in managing the wagon was imputable to the other. And in Omaha etc. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599, where two mechanics were struck by a train while crossing a railroad track in a wagon in which they were transporting their tools, the negligence of the one who was driving was imputed to the other.

But it does not follow that, because several persons are occupants of the same vehicle, they are engaged in a joint venture within this rule. In order to constitute such a joint enterprise, there should exist between them a joint or community of interest in the objects of the enterprise, and an equal right to direct and control the movements and conduct of each other in respect thereto: Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763. A husband and wife driving to town to purchase family supplies are not engaged in a "joint enterprise" in the sense that his negligence as driver can be imputed to her: Hajsek v. Chicago etc. R. R. Co., 68 Neb. 539, 94 N. W. 609.

b. Companions Walking Along Street.—Where two persons are walking together as companions, and the only common purpose in which they are engaged is passing along the street in the same direction at the same time, the negligence of one of them in stepping on a loose board, in consequence of which the other is thrown down

and injured, is not imputable to such other so as to bar his action against the city on account of the defective sidewalk: Barnes v. Town of Marcus, 96 Iowa, 675, 65 N. W. 984.

c. Companions Going Out in Boat.—But where two persons go out in a rowboat, and one of them does all the rowing and has charge of the boat, with the consent of the other, the negligence of the former in getting the boat in front of a steamer is held to be chargeable to the other, in Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799.

III. Parent and Child.

a. Imputing Negligence of Child to Parent.—The negligence of a son or daughter cannot, merely because of the relation of parent and child, be imputed to his or her parent: Watson v. Wabash etc. Ry. Co., 66 Iowa, 164, 23 N W. 380. For example, where a woman is riding in a vehicle driven by her son or daughter, over whom she exercises no control or authority in directing or managing the team, the want of care, if any, of the son or daughter cannot be attributed to the mother, in an action by her for injuries sustained through the negligence of third persons: Board of Commissioners v. Mutchler, 137 Ind. 140, 36 N. E. 534; Johnson v. City of St. Joseph, 96 Mo. App. 663, 71 S. W. 106; Weldon v. Third Avenue R. R. Co., 3 App. Div. 370, 38 N. Y. Supp. 206.

b. Imputing Negligence of Parent to Child.

1. In Action for Benefit of Parent.—If a parent fails to exercise reasonable or ordinary care in the control, management, direction, or protection of a child non sui juris, and such want of care directly contributes to the injury of the child by others, such contributory negligence on the part of the parent will be a defense to an action by the parent against the persons causing the injury, where the action is not for the benefit of the child, but for the parent. The negligence of one in whose custody the parent has intrusted the child will have a like effect. But to have this effect the negligence of the parent or custodian must be a proximate cause of the injury, and the negligence of the defendants must not be wanton or willful. If the injury was avoidable notwithstanding the contributory negligence of the parent or custodian, the action will lie: Pratt Coal etc. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555; Cauley v. East St. Louis etc. R. R. Co., 58 Ill. App. 151; Schlenks v. Central Pass. Ry. Co. (Ky.), 23 S. W. 589; Baltimore etc. Ry. Co. v. McDonnell, 43 Md. 534; Thomas v. Chicago etc. Ry. Co., 114 Iowa, 169, 86 N. W. 259; Westbrook v. Mobile etc. R. R. Co., 66 Miss. 560, 14 Am. St. Rep. 587, 6 South. 321; Winters v. Kansas City etc. Ry. Co., 99 Mo. 509, 17 Am. St. Rep. 591, 12 S. W. 652, 6 L. R. A. 536; Williams v. Gardiner, 58 Hun, 508, 12 N. Y. Supp. 612; Bellefontaine R. R. Co. v. Snyder, 24 Ohio St. 670; Pollack v. Pennsylvania R. R. Co., 210 Pa. St. 634, 105 Am. St. Rep. 846, 60 Atl. 312; notes to Freer v. Cameron, 55 Am. Dec. 677; Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 406-408. This rule applies, for example, where a

father permits his son to continue in an employment after notice that the work is dangerous: Schwenk v. Kehler, 122 Pa. St. 67, 9 Am. St. Rep. 70, 15 Atl. 694; or where a father permits his child to go upon a railroad track where trains are frequently passing: Pratt Coal etc. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555.

2. **In Action for Death of Child.**—The proposition is affirmed by a number of decisions that the negligence of parents contributing to the death of their child through the wrongful or negligent act of a third person will bar an action brought by them or the administrator of the deceased to recover for the death of the child: Alabama etc. R. R. Co. v. Dobbs, 101 Ala. 219, 12 South. 770; City of Pekin v. McMahon, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. E. 484, 27 L. R. A. 206; Grant v. City of Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84; Apsey v. Detroit etc. Ry. Co., 83 Mich. 432, 47 N. W. 319; Ihl v. Forty-second St. etc. R. R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Foley v. New York etc. R. R. Co., 78 How. 248, 28 N. Y. Supp. 816; Levine v. Metropolitan St. R. R. Co., 78 App. Div. 426, 80 N. Y. Supp. 48, affirmed in 177 N. Y. 523, 69 N. E. 1125; Westerberg v. Kinzua etc. R. R. Co., 142 Pa. St. 471, 24 Am. St. Rep. 510, 21 Atl. 878; Williams v. Texas etc. R. R. Co., 60 Tex. 205. This rule, however, will not be recognized where the child was using, when the accident befell him, all the care which the occasion demanded: Chicago City Ry. Co. v. Robinson, 127 Ill. 9, 11 Am. St. Rep. 87, 18 N. E. 772, 4 L. R. A. 126; Ihl v. Forty-second St. etc. R. R. Co., 47 N. Y. 317, 7 Am. Rep. 450. And if a minor is guilty of contributory negligence when killed through the negligence of a railroad company employing him without his father's consent, the father may recover damages for the death: Williams v. South and North Ala. R. R. Co., 91 Ala. 635, 9 South. 77.

Some authorities take the view that if a parent is not in a position to share in the distribution of the fund recovered in an action by him as administrator for the wrongful death of his child, his contributory negligence leading up to the death is immaterial: Murphy v. Derby St. Ry. Co., 73 Conn. 249, 47 Atl. 120. But if the parent is the real beneficiary in the action, as a distributee or sole heir of the deceased child, the contributory negligence of the parent can be shown in bar of the action: Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591; Bamberger v. Citizens' St. Ry. Co., 95 Tenn. 18, 49 Am. St. Rep. 909, 31 S. W. 163, 28 L. R. A. 486. The theory of these cases seems to be that to allow a parent to prevail in such an action would be to permit him to profit by his own wrong. There is some force in this doctrine where the person guilty of the contributory negligence is the sole beneficiary, but the negligence of one beneficiary should be no bar to a recovery by other innocent beneficiaries: Wolf v. Lake Erie etc. R. R. Co., 55 Ohio St. 530, 45 N. E. 708, 36 L. R. A. 812.

Quite a number of authorities maintain, however, that where a child is negligently killed under such circumstances that an action

could have been maintained by the child had it survived, notwithstanding the contributory negligence of its parent or custodian, then administrator of the child can maintain an action for the benefit of its estate, irrespective of whether the parents may share in the amount recovered. The fact that they may benefit, either directly or indirectly, is a mere incident of the action: Wymore v. Mahaska County, 78 Iowa, 396, 16 Am. St. Rep. 449, 43 N. W. 264, 6 L. R. A. 545; Warren v. Manchester St. Ry., 70 N. H. 352, 47 Atl. 735; Watson v. Southern Ry., 66 S. C. 47, 44 S. E. 375; Ploof v. Burlington Traction Co., 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; Norfolk etc. R. R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454.

The negligence of one parent in the care of a child cannot, according to weight of authority, be imputed to the other parent, so as to bar an action by the latter for his or her benefit, or as administrator, for the wrongful death of the child: Atlanta etc. Ry. Co v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550, 26 L. R. A. 553; Donk Bros. Coal Co. v. Leavitt, 109 Ill. App. 385; Macdonald v. O'Reilly, 45 Or. 589, 78 Pac. 753. A contrary view is taken in Toner v. South Covington etc. Ry. Co., 22 Ky. Law Rep. 564, 58 S. W. 439.

3. **In Action for Benefit of Child.**—Authority is not entirely wanting for the remarkable proposition that the negligence of a parent or custodian of a child non sui juris contributing to the injury of the child by third persons is imputable to the child so as to bar an action by or on behalf of the child against such third persons for their negligence or wrong in causing the injury: See the note to Freer v. Cameron, 55 Am. Dec. 677; Casey v. Smith, 152 Mass. 294, 23 Am. St. Rep. 842, 25 N. E. 734, 9 L. R. A. 259; Canavan v. Stuyvesant, 12 Misc. Rep. 74, 33 N. Y. Supp. 53. To illustrate, it has been held in a comparatively recent Massachusetts case that if a child less than three years old is left unattended in a yard fronting on a public street in which there is considerable teaming and a line of electric cars, between which yard and street there is a gate always open, and the child strays into the street, and, in trying to return, is run over and injured by a car, the negligence of the parents precludes any recovery by the child, where it does not exercise the care of a prudent adult: Coter v. Lynn etc. R. R. Co., 180 Mass. 145, 91 Am. St. Rep. 267, 61 N. E. 818.

This erroneous view of the law appears first to have been announced in America in the case of Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273, and has, as the above authorities will disclose, obtained some foothold in a few other jurisdictions. But the whole doctrine of the imputability of the misfeasance of the parent or custodian of a child to the child itself is a pure interpolation into the law. It finds no support in legal analogies or principles; and is repugnant to reason, wisdom, and justice. It has been emphatically repudiated by the great majority of the courts of this country, and eventually must entirely fade out of our jurisprudence: St. Louis Ry. Co. v. Rexroad, 59 Ark. 180, 26 S. W. 1037; Jacksonville Elec. Co. v. Adams (Fla.), 39 South. 183; Atlanta etc. Ry. Co. v. Gravitt, 93

Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550, 26 L. R. A. 553; Chicago City R. R. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; City of Evansville v. Senhenn, 151 Ind. 42, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728; McNamara v. Beck, 21 Ind. App. 483, 52 N. E. 707; Indianapolis St. Ry. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Fink v. City of Des Moines, 115 Iowa, 641, 89 N. W. 28; Union Pac. Ry. Co. v. Young, 57 Kan. 168, 45 Pac. 580; South Covington etc. Ry. Co. v. Herrklotz, 104 Ky. 400, 47 S. W. 265; Westerfield v. Levis, 43 La. Ann. 63, 9 South. 52; Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; Mattson v. Minnesota etc. R. R. Co. (Minn.), 104 N. W. 443; Westbrook v. Mobile etc. R. R. Co., 66 Miss. 560, 14 Am. St. Rep. 587, 6 South. 321; Louisville etc. Ry. Co. v. Hirsch, 69 Miss. 126, 13 South. 244; Winters v. Kansas City etc. Ry. Co., 99 Mo. 509, 17 Am. St. Rep. 591, 12 S. W. 652, 6 L. R. A. 536; Huff v. Ames, 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623; Newman v. Phillipsburgh etc. R. R. Co., 52 N. J. L. 446, 19 Atl. 1102, 8 L. R. A. 842; Carney v. Concord St. Ry., 72 N. H. 364, 57 Atl. 218; Bottoms v. Seaboard etc. R. R. Co., 114 N. C. 699, 41 Am. St. Rep. 799, 19 S. E. 730, 25 L. R. A. 784; Erie City etc. Ry. Co. v. Schuster, 113 Pa. St. 412, 57 Am. Rep. 471, 6 Atl. 269; Bamberger v. Citizens' St. Ry. Co., 95 Tenn. 18, 49 Am. St. Rep. 909, 31 S. W. 163, 28 L. R. A. 486; Nashville R. R. v. Howard, 112 Tenn. 107, 78 S. W. 1098; 64 L. R. A. 437; Gulf etc. Ry. Co. v. McWhirter, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26; Western Union Tel. Co. v. Hoffman, 80 Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048; Gulf etc. Ry. Co. v. Johnson (Tex. Civ. App.), 51 S. W. 531; Texas etc. Ry. Co. v. Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518; Norfolk etc. R. R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64; Dicken v. Liverpool Salt etc. Co., 41 W. Va. 511, 23 S. E. 582; Berry v. Lake Erie etc. R. R. Co., 70 Fed. 679; Chicago etc. Ry. Co. v. Kowalski, 34 C. C. A. 1, 92 Fed. 310; notes to Westbrook v. Mobile etc. R. R. Co., 14 Am. St. Rep. 590; Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 408.

The doctrine of the foregoing cases, to the effect that the negligence of a parent or custodian of a child non sui juris cannot be imputed to the child, so as to bar an action by it or on its behalf, is frequently applied where the child goes upon the public streets or on the tracks of railway company and is there struck by passing teams or cars: See the cases cited in the preceding paragraph and Missouri etc. Ry. Co. v. Stockman, 59 Kan. 774, 52 Pac. 446; Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270; or where the child, either unattended or in company with a parent, goes upon a public street and is there injured by the defective condition of the thoroughfare: Boehm v. Detroit (Mich.), 104 N. W. 626; City of Roanoke v. Shull, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34. The negligence of a father in permitting his child to use a vessel containing gasoline under the belief that it contains coal oil is not imputable to the child, so as to relieve the seller from lia-

bility for injury to the child resulting from a failure to label the vessel gasoline as required by statute: Ives v. Welden, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408, 54 L. R. A. 854. And the negligence of a parent in failing to procure medical aid after an injury to a child cannot be imputed to the latter: Texas etc. Ry. Co. v. Beckworth, 11 Tex. Civ. App. 153, 32 S. W. 809; Bradford City v. Downs, 126 Pa. St. 622, 17 Atl. 884. The contributory negligence of parents in carrying their child on a defective street-car does not preclude the child from recovering from the railway company for injuries sustained: Northern Texas Traction Co. v. Roye (Tex. Civ. App.), 86 S. W. 621.

The negligence of a parent or custodian of a child who, by reason of its mental capacity, is non sui juris, cannot be imputed to the child. The rule in such a case is similar to the rule in case the child is non sui juris by reason of its tender years: Markey v. Consolidated Traction Co., 65 N. J. L. 682, 46 Atl. 573, 48 Atl. 1117.

The negligence of a parent or custodian of a minor who is sui juris, or of sufficient age and capacity to exercise discretion in his own behalf, cannot be imputed to him so as to bar his action for injuries suffered through the negligent or wrongful conduct of others: Louisville etc. Ry. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837; Lafferty v. Third Avenue R. R. Co., 85 App. Div. 592, 83 N. Y. Supp. 405; affirmed in 176 N. Y. 594, 68 N. E. 1118; Over v. Missouri etc. Ry. Co. (Tex. Civ. App.), 73 S. W. 535.

4. **Exercise of Care by Child.**—Even in those jurisdictions where the contributory negligence of a parent is imputable to its child, such contributory negligence is no defense to an action by the child if it has not committed or omitted any act which constitutes contributory negligence in a person of years of discretion: McGary v. Loomis, 63 N. Y. 104, 20 Am. Rep. 510; Lafferty v. Third Avenue R. R. Co., 85 App. Div. 592, 83 N. Y. 405; affirmed in 176 N. Y. 594, 68 N. E. 1118. In a case where the conduct of an infant would not be negligence in an adult, the question of imputable negligence is immaterial: Chicago City etc. Ry. Co. v. Robinson, 127 Ill. 9, 11 Am. St. Rep. 87, 18 N. E. 722, 4 L. R. A. 126.

5. **Degree of Care Required of Parents.**—If the contributory negligence of a parent in caring for its child becomes a material inquiry in an action growing out of injuries to the child, the parent will be held to ordinary care, and to that only: Corbett v. Oregon Short Line R. R. Co., 25 Utah, 449, 71 Pac. 1065; note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 406-408. The question of whether the parent has exercised such care or has been negligent is usually a question of fact for the jury: See the monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 407. As to whether it is negligence for parents to allow their child of tender years to go unattended into the public streets, see Daly v. Hinz, 113 Cal. 366, 45 Pac. 693; West Chicago St. R. R. Co. v. Liderman, 187 Ill. 463, 79 Am. St. Rep. 226, 58 N. E. 367, 52 L. R. A. 655; Elwood

Elec. St. Ry. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535; Casey v. Smith, 152 Mass. 294, 23 Am. St. Rep. 842, 25 N. E. 734, 9 L. R. A. 259; and as to whether it is negligence for parents to allow their child to go near or upon railway tracks, see Lafayette etc. R. R. Co. v. Huffman, 28 Ind. 287, 92 Am. Dec. 318; Bottoms v. Seaboard etc. R. R. Co., 114 N. C. 699, 41 Am. St. Rep. 799, 19 S. E. 730, 25 L. R. A. 784; Cauley v. Pittsburg etc. Ry. Co., 95 Pa. St. 398, 40 Am. Rep. 664; Daubert v. Delaware etc. R. R. Co., 199 Pa. St. 345, 49 Atl. 72.

In determining whether parents have been guilty of contributory negligence in caring for or protecting their children, their financial condition would seem to be a proper matter for consideration. Parents who are in poverty, and even parents in the ordinary walks of life, should not be held to same degree of care and vigilance to see that their children do not wander into places of danger as should parents in affluent circumstances. "The same rule should not be applied to persons depending upon their labor for support, and to those whose means enable the mother of the family to give constant personal attention to the care of children, or to employ a nurse for that purpose": Chicago etc. R. R. Co. v. Gregory, 58 Ill. 226; True v. Woda, 104 Ill. App. 15; Rosenkranz v. Lindell Ry. Co., 108 Mo. 9, 32 Am. St. Rep. 588, 18 S. W. 890. The supreme court of California, however, has taken a contrary view of this question: Fox v. Oakland Consolidated St. Ry., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

IV. Teacher and Pupil.

Where school children during recess vex a ram, without the knowledge or consent of their teacher, and afterward the ram attacks her, the mischievous and wrongful conduct of the children cannot be imputed to her so as to bar her action for injuries sustained: Kinmouth v. McDougall, 64 Hun, 636, 19 N. Y. Supp. 771.

V. Husband and Wife.

The negligence of a husband is not, simply on the ground of the marital relation, imputable to his wife. At least this is the rule supported by the sounder reason and the great weight of authority. Thus the negligence of a husband in driving a conveyance cannot be imputed to his wife who is riding with him, in the event that the concurring negligence of others results in personal injuries to her: See the authorities cited under "Driver of Vehicle and Passenger or Guest," post. And his negligence, while they are walking together, in stepping on a loose board in the sidewalk which flies up and throws her down, is not a bar to her action against the city: Bailey v. City of Centerville, 115 Iowa, 271, 88 N. W. 379.

It has been affirmed, however, that the contributory negligence of a wife is a defense to an action by her husband for the loss of her services, due to her injury through the negligence of others: Chicago etc. R. R. Co. v. Honey, 63 Fed. 39, 12 C. C. A. 190, 27 U. S. App. 196, 26 L. R. A. 42, reversing Honey v. Chicago etc. R. R. Co., 59 Fed. 423. It has also been affirmed that in an action by a husband

and wife for a personal injury to her, his contributory negligence will defeat the suit: Pennsylvania R. R. Co. v. Goodenough, 55 N. J. L. 577, 28 Atl. 3, 22 L. R. A. 460.

The soundness of this decision is at least doubtful. Justice Dixon dissented from the majority of the court, and cited, among other cases, Hoag v. New York Cent. etc. R. R. Co., 111 N. Y. 199, 18 N. E. 648, to the effect that in an action by the administrator of a married woman to recover damages for her death caused by the negligence of the defendant, the contributory negligence of her husband is not imputable to her and is not a bar to the action. The contributory negligence of a husband in purchasing a drug for the use of his wife is not imputable to her in an action by her or her administrator against the druggist for injury or death resulting from using the drug, unless she clearly constituted him her agent in the transaction: Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350.

VI. Master and Servant.

a. Imputing Negligence of Servant to Master.—The contributory negligence of an employé or agent may be imputed to his master so as to defeat the latter's action against third persons for their negligence: La Reviere v. Pemberton, 46 Minn. 5, 48 N. W. 406; Van Lien v. Scoville Mfg. Co., 14 Abb. Pr., N. S., 74; Koslovki v. International Heater Co., 75 App. Div. 60, 77 N. Y. Supp. 794. For instance, if the owner of a team gives it in charge of his servant, the negligence of the servant in managing it is imputable to the owner: Louisville etc. Ry. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Smith v. New York Cent. etc. R. R. Co., 4 App. Div. 493, 38 N. Y. Supp. 666, 39 N. Y. Supp. 1119; Reed v. Metropolitan St. Ry. Co., 58 App. Div. 87, 68 N. Y. Supp. 539. And where the owner of a team intrusts it to his employé for the purpose of driving it home, and the employé negligently leaves the team to engage in an altercation with a third person, and the team, frightened by the noise, runs away to the injury of the carriage, the third person is not liable therefor, notwithstanding his conduct contributed to the accident: Page v. Hodge, 63 N. H. 610, 4 Atl. 805.

In fact, it has already appeared in the opening paragraphs of this note, under the head of "Relation of the Persons Involved," that the doctrine of imputed negligence is generally confined to cases where the relation exists of master and servant or of principal and agent, or some relation analogous thereto.

b. Imputing Negligence of Servant to Fellow-servant.—Where a servant is injured by the concurrent negligence of his fellow-servant and their master, the master is liable for the injury: Eureka Block Coal Co. v. Wells, 29 Ind. App. 1, 94 Am. St. Rep. 259, 61 N. E. 236; Chicago etc. Ry. Co. v. Gillison, 173 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657; Sroufe v. Moran, 28 Wash. 381, 92 Am. St. Rep. 847, 68 Pac. 896, 58 L. R. A. 313. And where one of two employés of a common master is injured by the negligence of a third person, the

fact that the negligence of the other employé contributed to the injury is no defense to an action by the injured servant against the third person: St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 288, 65 N. E. 90; Kentucky etc. R. R. Co. v. Sydor, 26 Ky. Law Rep. 951, 82 S. W. 989, 68 L. R. A. 183; Poor v. Sears, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046; McCormack v. Nassau etc. R. R. Co., 18 App. Div. 333, 46 N. Y. Supp. 230, citing Galvin v. Mayor, 112 N. Y. 223, 19 N. E. 675.

If, however, by reason of an agreement between two coemployés, it becomes the duty of one to be on the lookout for approaching danger and give the other notice thereof, the relation of principal and agent may be created in this respect, and the negligence of the one whose duty it is to ascertain the approach of danger may be imputed to the other: Abbitt v. Lake Erie etc. Ry. Co., 150 Ind. 498, 50 N. E. 729.

The contributory negligence of an engineer is not imputable to the fireman on the locomotive with him, in the event of a collision with another train or other accidents: Chicago etc. R. R. Co. v. McKittrick, 78 Ill. 619; Chicago etc. R. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22; Southern Ind. Ry. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550; Fort Worth etc. Ry. Co. v. Mackney, 83 Tex. 410, 18 S. W. 949; St. Louis etc. Ry. Co. v. Swinney, 34 Tex. Civ. App. 219, 78 S. W. 547; Gray v. Philadelphia etc. R. R. Co., 23 Blatchf. 263, 24 Fed. 168; Cincinnati etc. R. R. Co. v. Clark, 6 C. C. A. 281, 16 U. S. App. 17, 57 Fed. 125. And the negligence of the engineer is not imputable to the conductor on the train at a time when he was not subject to the conductor's control: St. Louis etc. R. R. Co. v. McFall (Ark.), 86 S. W. 824, 69 L. R. A. 217. But the negligence of the gripman on a street-car, who is under the direction and control of the conductor, may be imputed to the conductor: Minster v. Citizens' Ry. Co., 53 Mo. App. 276. The negligence of the conductor of a street-car is not necessarily imputable to the motorman: Harper v. Delaware etc. R. R. Co., 47 N. Y. Supp. 933, 22 App. Div. 273. And the negligence of the driver of a horse-car is not usually imputable to the conductor: Hobson v. New York Condensed Milk Co., 25 App. Div. 111, 49 N. Y. Supp. 209; Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 353.

VII. Fellow-guests at Hotel.

While a theft from a guest at a hotel by a companion whom he brings to the inn is imputable to the guest as his own negligence, he is not to be charged with negligence merely because the theft was committed by another guest of the inn whom he does not bring there, even though with his consent he is placed to sleep in the same room with such other guest: Olson v. Crossman, 31 Minn. 222, 17 N. W. 375. And a hotel-keeper cannot escape liability for the theft of goods belonging to his guest, where a chambermaid admits another guest to his room, because, as she says, she had seen them together there on several occasions: Jacobi v. Haynes, 35 N. Y. Supp. 120, 14 Misc. Rep. 15.

VIII. Bailor and Bailee.

The owner of a horse and buggy is not liable to a third person who is injured by the negligent driving of the borrower of the horse and vehicle, if they are not at the time being used in the owner's business: Herlihy v. Smith, 116 Mass. 265. But where one loans his horse to another, even gratuitously, and the borrower, while using the animal for the purpose for which it was loaned, rides or drives it upon a railroad track where it is killed by a train, his negligence in so doing is imputable to the owner and bars an action by the latter against the railroad company: Welty v. Indianapolis etc. R. R. Co., 105 Ind. 55, 4 N. E. 410; Illinois Cent. R. R. Co. v. Sims, 77 Miss. 325, 27 South. 527, 49 L. R. A. 322. And the contributory negligence of a borrower, without hire, of a horse is imputable to the owner so that he cannot recover for an injury suffered by the animal from a defective highway: Forks Township v. King, 84 Pa. St. 230. If the bailees of cotton negligently allow it to remain on a railroad platform, with the knowledge of the bailor, he cannot recover from the railroad company for an injury to the cotton by fire from its engines: Texas etc. Ry. Co. v. Tankersley, 63 Tex. 57.

IX. Carrier of Goods—Consignor and Consignee.

The consignor of goods is, in a sense, the agent of the consignee in shipping the goods sold, so that if he selects an unsuitable car in which to make the shipment, whereby the goods are injured, the consignor cannot recover for the loss from the railroad company. This rule was applied in the recent case of Frohlich v. Pennsylvania Co., 138 Mich. 116, post, p. 310, 101 N. W. 223, where it was decided that if the consignor selects for the transportation of glass a car unsuitable, by reason of defects discernible upon inspection, for that particular class of goods, the carrier is not liable for a loss due to the unsuitableness or defective condition of the car. However, the contributory negligence of the shipper of goods cannot be pleaded to relieve a negligent carrier from liability. The carrier is liable for any injury to goods or freight done through the concurrent negligence of himself and the shipper: McCarthy v. Louisville etc. R R. Co., 102 Ala. 193, 48 Am. St. Rep. 29, 14 South. 370.

X. Carrier and Passenger.

a. Imputing Negligence of Carrier to Passenger.

1. **In Case of Boat or Railway Train.**—The negligence of a carrier is not imputable to a passenger who is injured by the concurrent negligence of the carrier and another. This rule applies to passengers on a boat (Louisville etc. Packet Co. v. Mulligan, 25 Ky. Law Rep. 1287, 77 S. W. 704; Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32; Markham v. Houston Direct Nav. Co., 73 Tex. 247, 11 S. W. 131; New York etc. R. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321; Robinson v. Detroit etc. Nav. Co., 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 883; and to passengers on a railway train (Pittsburg

etc. R. R. Co. v. Spencer, 98 Ind. 186; Chicago etc. Ry. Co. v. Groves, 56 Kan. 601, 44 Pac. 628; Holzab v. New Orleans etc. R. R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; Flaherty v. Minneapolis etc. Ry. Co., 39 Minn. 328, 12 Am. St. Rep. 654, 40 N. W. 160, 1 L. R. A. 680; Colegrove v. New York etc. R. R. Co., 6 Duer, 382, affirmed in 20 N. Y. 492, 75 Am. Dec. 418; Chapman v. New Haven etc. R. R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Bunting v. Hogsett, 139 Pa. St. 363, 23 Am. St. Rep. 192, 21 Atl. 31, 12 L. R. A. 268), and to passengers on a street-car: Georgia Pac. Ry. Co. v. Hughes, 87 Ala. 610, 6 South. 413; Covington Transfer Co. v. Kelly, 36 Ohio St. 86.

2. **In Case of Coach or Horse-car.**—The negligence of the driver of a street-car in bringing the car into collision with a railway train cannot be imputed to a passenger in the car so as to defeat his right of action against the railroad company for its negligence: Little Rock etc. R. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Kuttner v. Lindell Ry. Co., 29 Mo. App. 502; Bennett v. New Jersey etc. Transp. Co., 36 N. J. L. 225, 13 Am. Rep. 435; McCallam v. Long Island R. R. Co., 38 Hun, 569; Gulf etc. Ry. Co. v. Pendry, 87 Tex. 553, 47 Am. St. Rep. 125, 29 S. W. 1038; Whelan v. New York etc. R. R. Co., 38 Fed. 15. And the negligence of a stage-driver in bringing the stage into collision with a railway train is not imputable to his passengers: Beeke v. Missouri Pac. Ry. Co., 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157.

The contributory negligence of the driver of a hack, omnibus, or other public carriage cannot be imputed to one who hires it and exercises no further control over the driver than to give directions as to where he wishes to be conveyed. If, in such a case, the passenger is injured through a collision with a railway train brought about by the concurring negligence of the driver and the railway company, he can maintain an action against such company, notwithstanding the driver's want of care: East Tennessee etc. Ry. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; Landon v. Chicago etc. Ry. Co., 92 Ill. App. 216; Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Larkin v. Burlington etc. Ry. Co., 85 Iowa, 492, 52 N. W. 480; Barnes v. Inhabitants of Rumford, 96 Me. 315, 52 Atl. 844; New York etc. R. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; Bradley v. Ohio River etc. Ry. Co., 126 N. C. 735, 36 S. E. 181; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652; Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 316; The Bernia, L. R. 12 Prob. Div. 38. The New York courts, however, appear to have come to a contrary conclusion: Brown v. New York Cent. R. R., 32 N. Y. 597, 88 Am. Dec. 353; Callahan v. Sharp, 27 Hun, 85.

When one hires a hack to convey him to or from a funeral, the hack being driven by a hackman who is employed by the owner and who is not controlled by the passenger, the negligence of the driver is not imputable to the passenger: Randolph v. O'Riordan, 155 Mass. 331, 29 N. E. 583.

b. Imputing Negligence of Passenger to Fellow-passenger.—The negligence of one's companion in a sleeping-car berth will not preclude a recovery from the sleeping-car company for its negligence in permitting a theft of property: Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 74 Am. St. Rep. 53, 24 South. 921, 45 L. R. A. 767.

XI. Driver of Vehicle and Passenger or Companion.

a. Imputing Negligence of Driver to Passenger, in General.—The doctrine prevails in a few of the American states that the contributory negligence of the driver of a private conveyance is imputable to a person voluntarily riding with him: Whittaker v. City of Helena, 14 Mont. 124, 43 Am. St. Rep. 621, 35 Pac. 904; Omaha etc. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30. The supreme court of Michigan committed itself to this error in Mullen v. City of Owosso, 100 Mich. 103, 43 Am. St. Rep. 436, 58 S. W. 663, 23 L. R. A. 693, but in the principal case (ante, p. 275) refused to carry it so far as to impute the negligence of a driver to a minor. Some of the above decisions, notably those from Wisconsin, are based on the theory that an agency exists between the driver and his companion or passenger. It is curious that this idea, untenable as it is, did not occur to the English judges who based their decisions on the theory of "identification." The fallacy of both these theories is well pointed out in Duval v. Atlantic Coast R. R. Co., 134 N. C. 331, 101 Am. St. Rep. 830, 46 S. E. 750, 65 L. R. A. 722.

Nearly all the courts have expressly and unmistakably repudiated the doctrine that the contributory negligence of the driver of a private conveyance can, as a general rule, be imputed to a person riding in the conveyance with him. And the law almost universally now recognized is, that when one accepts an invitation to ride in the vehicle of another, without any authority or purpose to direct or control the driver or the movements of the team, and without any reason to doubt the competency of the driver, the contributory negligence of the owner or driver of the conveyance will not be imputed to the guest or passenger, so as to bar him of the right to recover damages from third persons whose negligence or wrongful acts occasion injury to him while he is so riding: Farley v. Wilmington etc. Ry. Co., 3 Penne. (Del.) 581, 52 Atl. 543; Metropolitan St. R. R. Co. v. Powell, 89 Ga. 601, 16 S. E. 118; Chicago City Ry. Co. v. Wall, 93 Ill. App. 411; Lake Shore etc. Ry. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Nesbit v. Town of Garner, 75 Iowa, 314, 9 Am. St. Rep. 486, 39 N. W. 516, 1 L. R. A. 152; City of Leavenworth v. Hatch, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; Cahill v. Cincinnati etc. Ry. Co., 92 Ky. 345, 18 S. W. 2; Baltimore etc. R. R. Co. v. State, 79 Md. 335, 47 Am. St. Rep. 415, 29 Atl. 518; Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763; Alabama etc. Ry. Co. v. Davis, 69 Miss. 444, 13 South. 693; Dickson v. Missouri Pac. Ry. Co., 104 Mo. 491, 16 S. W. 381; Consolidated Traction Co. v.

Hoinmark, 60 N. J. L. 456, 38 Atl. 684; Flanagan v. New York Cent. etc. R. R. Co., 70 App. Div. 505, 75 N. Y. Supp. 225; Robinson v. Metropolitan St. R. R. Co., 91 App. Div. 158, 86 N. Y. Supp. 442; affirmed in 179 N. Y. 593, 72 N. E. 1150; Duval v. Atlantic etc. R. R. Co., 134 N. C. 331, 101 Am. St. Rep. 830, 46 S. E. 750, 65 L. R. A. 722; Borough of Carlisle v. Brisbane, 113 Pa. St. 544, 57 Am. Rep. 483, and note, 6 Atl. 372; Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514, 15 Am. St. Rep. 733, 18 Atl. 718, 6 L. R. A. 143; Hydes Ferry Turnpike Co. v. Yates, 108 Tenn. 428, 67 S. W. 69; Galveston etc. Ry. Co. v. Kutoc, 72 Tex. 643, 11 S. W. 127; Missouri etc. Ry. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956; Atlantic etc. R. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; Union Pac. Ry. Co. v. Lapsley, 2 C. C. A. 149, 51 Fed. 174, 16 L. R. A. 800; The Bernia, L. R. 12 Prob. Div. 58, L. R. 13 App. Cas. 1.

b. Payment of Compensation for Ride.—This rule applies where the guest or passenger is being carried gratuitously. In fact, probably in the great majority of the cases in which this question arises, no compensation for the transportation is made or contemplated: State v. Boston etc. R. R. Co., 80 Me. 430, 15 Atl. 36; Noonan v. Consolidated Traction Co., 64 N. J. L. 579, 46 Atl. 770; Dyer v. Erie etc. R. R. Co., 71 N. Y. 228; Pyle v. Clark, 79 Fed. 744, 25 C. C. A. 190. It would seem immaterial, however, whether one is a passenger for hire or a mere guest or companion: Duval v. Atlantic etc. R. R. Co., 134 N. C. 331, 101 Am. St. Rep. 830, 46 S. E. 750. The rule certainly is not confined to cases of gratuitous transportation, but applies where a conveyance is hired, and the passenger exercises no further control over the driver than to direct him to the place to which he wishes to be taken: Sender v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648; Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548; Crampton v. Ivie, 126 N. C. 894, 36 S. E. 351; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652. However, if the passenger assumes to direct the driver or control the movements of the team, he becomes chargeable with the contributory negligence of the driver: Dryden v. Pennsylvania R. R. Co., 211 Pa. St. 620, 61 Atl. 249.

c. Public or Private Conveyance.—In cases where compensation is paid for the transportation, the conveyance is usually of a public character, but it is doubtful whether the law, as a general rule, makes any distinction between public and private vehicles, so far as concerns the imputation of the driver's negligence to persons riding therein: State v. Boston etc. R. R. Co., 80 Me. 430, 15 Atl. 36; Randolph v. O'Riordan, 155 Mass. 351, 29 N. E. 583; Howe v. Minneapolis etc. Ry. Co., 62 Minn. 71, 54 Am. St. Rep. 616, 64 N. W. 102, 30 L. R. A. 684.

d. Invitation of Driver.—In probably the great majority of cases in which it is sought to impute the contributory negligence of a driver to the person riding with him, the passenger is riding at the invitation of the driver; but where a person, at his own request, rides with another who owns and controls the conveyance, and whose

judgment and capacity to drive the passenger has no reason to doubt, the negligence of the driver contributing to the injury of the passenger cannot be imputed to the latter: Ouversen v. City of Grafton, 5 N. Dak. 281, 65 N. W. 676.

And one who, uninvited or without the knowledge of the driver of a private vehicle, gets upon it for the purpose of riding, does not thereby assume the relation of master or superior toward the driver, and is not therefore chargeable with the negligence of the driver in driving or managing the conveyance: Cincinnati St. Ry. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340.

e. **Control Over Driver by Passenger.**—Indeed, the general rule is, that in order to charge a passenger with the contributory negligence of the driver of the conveyance, the passenger must have assumed toward the driver the relation of master or superior: Cincinnati St. Ry. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340. But where the passenger is in a position to exercise control over the driver, and direct and restrain him in the management of the team, then the contributory negligence of the driver may properly be imputed to the passenger: Colorado etc. Ry. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801; Dryden v. Pennsylvania R. R. Co., 211 Pa. St. 620, 61 Atl. 249. It has been said, however, that to have this effect, the passenger must practically be in the exclusive possession or control of the conveyance: Crampton v. Ivie, 126 N. C. 894, 36 S. E. 351; Duval v. Atlantic Coast etc. R. R. Co., 134 N. C. 331, 101 Am. St. Rep. 830, 46 S. E. 750, 65 L. R. A. 722. He certainly cannot be said to be in possession or control, within this rule, merely because he gives directions, or suggestions as to the route or place of destination: Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648; Zimmerman v. Union R. R. Co., 28 App. Div. 445, 51 N. Y. Supp. 1; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652.

f. **Care Required of Passenger.**—Moreover, if a passenger would avoid the imputation of the driver's negligence he should himself be free from negligence. But what amounts to negligence on his part the courts are not agreed upon. Some courts hold that it is his duty to use reasonable care and judgment to learn of and avoid danger, so far as he has opportunity to do so. For example, when the conveyance is approaching a railroad crossing, he should look and listen for approaching trains, and, more than this, if he ascertains the presence of danger, he should inform the driver, and remonstrate with and check him in case he attempts to cross in the face of danger. A passenger who acquiesces in the reckless or negligent conduct of the driver on such occasions cannot recover from the railway company in the event of a collision with the cars. He should do all that a prudent and careful man would do under the circumstances, notwithstanding he has no authority or control over the driver: Colorado etc. Ry. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801; Willfong v. Omaha etc. R. R. Co., 116 Iowa, 548, 90 N. W. 358; Smith v. Maine Cent. R. R. Co., 87 Me. 339, 32 Atl. 967; Illinois

Cent. R. R. Co. v. McLeod, 78 Miss. 334, 84 Am. St. Rep. 630, 29 South. 76, 52 L. R. A. 954; Holden v. Missouri R. R. Co., 177 Mo. 456, 76 S. W. 973; Crawford v. Delaware etc. R. R. Co., 1 N. Y. Supp. 339, affirmed in 121 N. Y. 652, 24 N. E. 1092; Flanagan v. New York Cent. R. R. Co., 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed in 173 N. Y. 631, 66 N. E. 1108; Durkee v. Delaware etc. Canal Co., 88 Hun, 471, 34 N. Y. Supp. 978.

Certainly the passenger or companion is not required to exercise any higher degree of care and watchfulness than the driver: Wilson v. New York etc. R. R. Co., 18 R. I. 598, 29 Atl. 300. And yet some authorities have gone so far as to declare that it is no less the duty of the passenger than it is the duty of the driver to be on the lookout for danger and avoid it, when approaching a railroad crossing: Lake Shore etc. Ry. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Willfong v. Omaha etc. R. R. Co., 116 Iowa, 548, 90 N. W. 358; Brickell v. New York Cent. etc. R. R. Co., 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449. It is possible to conceive of cases where such might be the law, but we are not persuaded that so rigorous a rule should be given a general application. Indeed, we think that, except in very exceptionable cases, a passenger, whether for hire or not, and whether in a public or a private conveyance, should not be held to the same degree of watchfulness as the driver. Moreover, we incline to the view that, in most instances, a passenger is not required to look and listen for the approach of trains as the vehicle approaches the track of a railway, unless he has some reason to distrust the competency and prudence of the driver: East Tennessee etc. Ry. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281; Perez v. New Orleans etc. R. R. Co., 47 La. Ann. 1391, 17 South. 869; Howe v. Minneapolis etc. Ry. Co., 62 Minn. 71, 54 Am. St. Rep. 616, 64 N. W. 102, 30 L. R. A. 684; O'Toole v. Pittsburgh etc. R. R. Co., 158 Pa. St. 99, 38 Am. St. Rep. 830, 27 Atl. 737, 22 L. R. A. 606; Gulf etc. Ry. Co. v. Pendry, 87 Tex. 553, 47 Am. St. Rep. 125, 29 S. W. 1038; Pyle v. Clark, 75 Fed. 644.

In this last case a Doctor Wright was riding in a private conveyance, the driver of which was not his servant nor under his control, when they were struck by a railway train. "It is said," to quote from Justice Marshall's opinion, "that the law imposed on Doctor Wright the same duty of watchfulness that was required of Pyle, the driver of the team—that Doctor Wright should have seen the approaching train and have warned Pyle of the danger. I do not think the law fixes a standard of specific acts for passengers in either public or private conveyances. If such a passenger, as a matter of law, must look and listen for approaching trains before the carrier crosses the track, it would be negligence for him to ride in such a position in the vehicle as to preclude his looking. As said by Mr. Justice Depue in New York etc. R. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126: 'Not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and

control of his team.' It is a matter of common experience that passengers in a vehicle trust to the driver to avoid the ordinary dangers of the road, and I do not know of any principle of law which requires them to tender advice, unless conscious of the driver's ignorance or want of care. If the law were otherwise, there would have been little reason for inventing the doctrine of identification, so far, at least, as passengers of private carriers are concerned. In each case it would have been sufficient to say that the law required the passenger to look out for danger, and to advise the driver of the impending accident that he failed in that duty, and could not recover. Such a doctrine would prevent his recovery even against the negligent driver, or the driver's master.''

A wife riding with her husband, or a daughter riding with her father, may have his negligence as driver imputed to her, if she is indifferent to her own safety in being driven in front of railway trains or over dangerous roads: Cincinnati etc. Ry. Co. v. Howard, 124 Ind. 280, 19 Am. St. Rep. 96, 24 N. E. 892, 8 L. R. A. 593; Miller v. Louisville etc. Ry. Co., 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; Hajsek v. Chicago etc. R. R. Co. (Neb.), 97 N. W. 327; Hoag v. New York Cent. etc. R. R. Co., 111 N. Y. 199, 18 N. E. 648; Winner v. Oakland, 158 Pa. St. 405, 27 Atl. 1110.

g. Illustrative Cases, Generally.—The rule that the negligence of a driver will not be imputed to a guest or passenger riding with him finds most frequent application where the negligence of the driver in the management of the horses and vehicle brings the conveyance into collision with the cars or trains of railway corporations: Hot Springs St. Ry. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245; Philadelphia etc. R. R. Co. v. Hogeland, 66 Md. 149, 59 Am. Rep. 159, 7 Atl. 105; United Rys. etc. Co. v. Biedler, 98 Md. 564, 56 Atl. 813; Marsh v. Kansas City etc. Ry. Co., 104 Mo. App. 577, 78 S. W. 284; Bryant v. International etc. Ry. Co., 19 Tex. Civ. App. 88, 46 S. W. 82. The rule has been applied, however, in a great variety of cases. For example, the negligence of the driver of a team is not imputable to one riding with him when the team becomes frightened by an automobile (Christy v. Elliott, 216 Ill. 31, 108 Am. St. Rep. 196, 74 N. E. 1035), or where the conveyance is brought into collision with an improperly located telephone pole (Bevis v. Vanceburg Tel. Co., 28 Ky. Law Rep. 142, 89 S. W. 126), or where an accident results from a defective or dangerous street or highway: Noyes v. Boscawen, 64 N. H. 361, 10 Am. St. Rep. 410, 10 Atl. 690; Follman v. City of Mankato, 35 Minn. 522, 57 Am. Rep. 480, 29 N. W. 317; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76.

h. Woman Riding at Man's Invitation.—Where a woman accepts the invitation of a man to ride in his carriage, and thereby becomes his guest, without authority to direct or control the conduct or movements of the driver or conveyance, and without reason to question his competency to drive, his want of care cannot be imputed to her in the event of an accident overtaking them: Town of Knightstown

v. Musgrove, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452; Robinson v. New York Cent. etc. R. R. Co., 66 N. Y. 11, 23 Am. Rep. 1.

i. **Parties to a Pleasure Trip.**—But where a lady is driving with a gentleman for the mutual pleasure of both, with opportunity to see and equal ability to appreciate the danger, and in fact looking out for herself, but makes no effort to avoid the danger, she may be chargeable with the want of care which results in injury: Bush v. Union Pac. R. R. Co., 62 Kan. 709, 64 Pac. 624. Where, however, a party of young men and women make up a picnic party, the ladies furnishing the lunches and the gentlemen hiring the conveyance—an omnibus drawn by four horses, as to the hiring and driving of which the ladies have nothing to do—the negligence of one of the young men in driving which concurs with the negligence of the city in respect to the condition of its streets, cannot be imputed to one of the ladies in her action against the city for injuries received from the overturning of the vehicle: Koplitz v. City of St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74. So, where one contracts with a liveryman to furnish a tally-ho and horses and transport a party on a pleasure trip, he is not chargeable with the contributory negligence of the driver, who has practically the entire control and management of the conveyance: Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548.

j. **Husband and Wife.**—While some few authorities may be found which impute to a wife, while riding with her husband, his negligence in driving or managing the team (Carlisle v. Town of Sheldon, 38 Vt. 440; Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Morris v. Chicago etc. R. R. Co., 26 Fed. 22), the correct view, and the view supported by the great preponderance of authority, is that the contributory negligence of a husband in driving a conveyance cannot be imputed to her while she is riding with him, in the event that an injury befalls her as a result of the negligence of a third person: Louisville etc. R. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Galveston etc. Ry. Co. v. Kutac, 76 Tex. 473, 13 S. W. 327; Shaw v. Craft, 37 Fed. 317; Sheffield v. Central Union Tel. Co., 36 Fed. 164.

For example, the negligence of a husband in driving on a railroad track in front of an approaching car or train is no bar to an action by his wife against the railroad company for injuries sustained by her from the collision which results: Chicago etc. R. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Lake Shore etc. Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Indianapolis St. Ry. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; Finley v. Chicago etc. Ry. Co., 71 Minn. 471, 74 N. W. 174; Lammers v. Great Northern Ry. Co., 82 Minn. 120, 84 N. W. 728; Lewin v. Lehigh Val. R. R. Co., 58 N. Y. Supp. 113, 41 App. Div. 89. Neither can his negligence in driving over a dangerous or defective highway defeat her right of action against the municipality if injury results to her: Reading Township v.

Telfer, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134; Platz v. City of Cohoes, 24 Hun, 101, 8 Abb. N. C. 392.

k. Parent and Child.—A few courts have declared that the negligence of a parent in driving a team is imputable to his child riding with him: Kyne v. Wilmington etc. R. R. Co., 8 Houst. 185, 14 Atl. 922; Metcalf v. Rochester Ry. Co., 12 App. Div. 147, 42 N. Y. Supp. 661; Norris v. Chicago etc. R. R. Co., 26 Fed. 22. This declaration involves a double error, for we have already pointed out that the negligence of a parent is not imputable to his child, and the negligence of a driver is not imputable to his guest or companion. The authorities generally hold that the negligence of a father or mother in driving a conveyance cannot be imputed to his or her minor child who is riding therein, so as to preclude the latter from maintaining an action for injuries received by it through the concurring negligence of a third person: St. Clair St. Ry. Co. v. Eadie, 43 Ohio St. 91, 54 Am. St. Rep. 802, 1 N. E. 519; Houston City St. Ry. Co. v. Richart (Tex. Civ. App.), 27 S. W. 918; Griffith v. Baltimore etc. R. R. Co., 44 Fed. 574; Kowalski v. Chicago etc. Ry. Co., 84 Fed. 586.

The negligence of a father is not imputable to his child when it is injured while in its mother's arms in a vehicle driven by the father: Hennessey v. Brooklyn City R. R. Co., 6 App. Div. 206, 39 N. Y. Supp. 805; Lewin v. Lehigh Val. R. R. Co., 52 App. Div. 69, 65 N. Y. Supp. 49. But in Delaware etc. R. R. Co. v. Devore, 114 Fed. 155, 52 C. C. A. 77, it is held, under a similar state of facts, that both the negligence of the father and of the mother in failing to discover the approach of a railway train is imputable to the child.

The negligence of a son or daughter in driving a conveyance is not ordinarily imputable to his or her father or mother riding therein: Board of Commissioners v. Mutchler, 137 Ind. 140, 36 N. E. 534; Weldon v. Third Ave. R. R. Co., 3 App. Div. 370, 38 N. Y. Supp. 206.

l. Master and Servant.—The negligence of a servant in failing, while driving a vehicle in which his master is riding, to avoid danger is imputable to the master: Read v. City & Suburban Ry. Co., 115 Ga. 366, 41 S. E. 629; Markowitz v. Metropolitan St. Ry. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; Carson v. Federal St. etc. Ry. Co., 147 Pa. St. 219, 30 Am. St. Rep. 727, 23 Atl. 369, 15 L. R. A. 257. But where a servant, without authority from his master, takes the latter's children in a wagon in which he delivers the master's goods, and through the negligence of the servant and a railroad company the children are killed, the contributory negligence of the servant does not bar the master's right of action against the railroad company: Faust v. Philadelphia etc. Ry. Co., 191 Pa. St. 420, 43 Atl. 329.

m. Coemployés or Fellow-servants.—Where two employés of the same employer are on a vehicle, the contributory negligence of the one who drives the team cannot ordinarily be imputed to the other who has no control over the management of the conveyance: Anderson v. Metropolitan St. Ry. Co., 30 Misc. Rep. 104, 61 N. Y. Supp.

899. "As the concurring negligence of a coservant is no bar to the action of a servant against a master for the latter's negligence, we do not well see how it can have any greater effect to relieve a third party from liability from wrong": McCormack v. Nassau etc. R. R. Co., 18 App. Div. 333, 46 N. Y. Supp. 230.

The contributory negligence of the driver of an ice or furniture wagon cannot be imputed to his helper, the two being employed by a common master: McCormack v. Nassau etc. R. R. Co., 16 App. Div. 24, 44 N. Y. Supp. 684; Waters v. Metropolitan St. Ry. Co., 85 N. Y. Supp. 1120; Le Banc v. Interurban St. Ry. Co., 88 N. Y. Supp. 150. And where two policemen are sent with an ambulance to bring a prisoner to the station-house, the negligence of the one who drives the vehicle is not imputable to the one who rides inside: Bailey v. Jourdan, 18 App. Div. 387, 46 N. Y. Supp. 399.

The contributory negligence of the driver of a fire-engine, hose-cart, or fire truck, cannot be imputed to the engineer and firemen riding thereon, in case of a collision with a railway car or some other accident occasioned by the negligence of third persons: Elyton Land Co. v. Mingea, 89 Ala. 521, 7 South. 666; Birmingham Ry. etc. Co. v. Baker, 132 Ala. 507, 31 South. 618; McKernan v. Detroit etc. Ry. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347; Galligan v. Metropolitan St. R. R. Co., 66 N. Y. Supp. 1131, affirmed in 33 Misc. Rep. 87, 67 N. Y. Supp. 180; Geary v. Metropolitan St. R. R. Co., 84 App. Div. 514, 82 N. Y. Supp. 1016; affirmed in 177 N. Y. 535, 69 N. E. 1123.

n. Infirm Person Placing Himself in Care of Driver.—Where one who is blind and unable to take care of himself confides himself, while riding, to the care of his father, the negligence of the latter in driving has been held imputable to the former: Johnson v. Gulf etc. Ry. Co., 2 Tex. Civ. App. 139, 21 S. W. 274; Central Texas etc. Ry. Co. v. Gibson (Tex. Civ. App.), 83 S. W. 862. This holding proceeds on the theory that in such a case the relation of principal and agent exists between the driver and passenger, and does not recognize that the negligence of a driver is imputable to persons riding with him in the absence of some such relation existing between them. In the recent case of Evensen v. Lexington etc. Ry. Co., 187 Mass. 77, 72 N. E. 355, it is decided that the right of one who, while not feeling well, intrusts himself to the care of the driver of a vehicle, to recover for injuries caused by the negligence of a street railway company, depends on the exercise of due care by the driver.

PEOPLE v. BIRD.

[138 Mich. 31, 100 N. W. 1003.]

LIQUOR, Giving to Minor as Act of Hospitality.—The statute of Michigan which prohibits the furnishing of liquor to minors does not make it unlawful for one, in exercising the hospitality of his home, to give liquor to a minor guest. (p. 301.)

A. A. Ellis, for the appellant.

William K. Clute, prosecuting attorney, for the appellee.

[31] MOORE, C. J. Respondent was convicted of violating the provisions of the so-called liquor law, contained in section 5391 of 2 Compiled Laws. He has brought the case here by appeal.

[32] The record upon the part of the people discloses that respondent is not a saloon-keeper or druggist, but is a laboring man. At the solicitation of his wife he obtained three bottles of beer, and brought them home. The money to buy the beer was furnished by respondent's father, William Bird. After the beer was brought to the dwelling-house of respondent, the respondent, his wife, his father, and one Mattie White, who was about sixteen years old, sat about a table. Mrs. Bird poured the beer out into glasses. After she had done so, respondent handed a glass of it to Miss White, who drank it. Afterward another glass of the beer was handed to her by respondent, part of which she drank. It is also claimed that Mrs. Bird, in the presence of her husband, mixed some alcohol with water, and gave it to Miss White.

The question involved is whether this was a violation of the law. It is the claim of the people that it is not lawful for any person except a druggist to give to any minor beer, wine or spirituous liquor. It is the claim of the respondent that the law relates to a business, and does not preclude one in exercising the hospitality of his home from giving to one of his guests beer, wine or spirituous liquors, even though the guest is under the age of twenty-one years. It is stated by the prosecuting attorney that the question involved has never been passed upon by this court.

The title to the act relating to the question involved reads: "An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous and intoxicating liquors and malt, brewed, or fermented liquors and vinous liquors

in this state, and to repeal all acts or parts of acts inconsistent with the provisions of this act": Act No. 313, Pub. Acts 1887.

Section 5391 of 2 Compiled Laws, so far as it is material to this action, reads: "It shall not be lawful for any person, except a druggist, who shall be governed by section two of this act, to sell, [33] furnish or give any spirituous, malt, brewed, fermented, or vinous liquors, or any beverage, liquor, or liquids containing any spirituous malt, brewed, fermented or vinous liquors, to any minor, to any intoxicated person. The fact of selling, giving, or furnishing any liquid in any place where intoxicating liquors are sold or kept for sale, to any minor, or to any intoxicated person, ... shall be prima facie evidence of an intent on the part of the person so selling, giving or furnishing such liquid, to violate the law."

Many of the cases cited on the part of the people, like State v. Best, 108 N. C. 747, 12 S. E. 907, are cases where the liquor was furnished to the minors by a saloon-keeper. Others are where the minor furnished the money to pay for the liquor, and do not afford much light upon the question involved here.

In one of the cases cited—Johnson v. People, 83 Ill. 431—it is said: "It is not necessary to now determine whether a person would incur the penalty of this section by giving it as an act of hospitality at his house, as that question is not before the court."

In Altenburg v. Commonwealth, 126 Pa. St. 602, 17 Atl. 799, 4 L. R. A. 543, it is said: "The general provisions of the act of 1887 [Laws 1887, Act No. 53] relate to and are designed to regulate the sale of liquors by the various classes of venders known to the law. They are not directed against the use of such liquors by the individual citizen, and they do not interfere with his right to supply his table with them, or furnish them to his family or his guests."

In the case of Commonwealth v. Davis, 75 Ky. 240, cited by counsel, the respondent and one Rison, a minor, contributed money to purchase whisky. The respondent procured the whisky, and gave part of it to Rison, who drank it. It was held this was a violation of the statute; the court saying of the statute, "The object was to make it unlawful for any person other than the father or guardian of a minor to place such liquors in his hands," [34] etc. It will be seen this case does not meet the one under consideration.

In Black on Intoxicating Liquors, section 407, it is said: "The provisions of the liquor laws being aimed at the suppression of an illicit or injurious traffic in intoxicants, it is considered that a person is not liable to indictment for furnishing liquor to a friend or guest at his private residence as an act of kindness or hospitality"; citing several cases.

If the contention of the people is true, while a father might furnish, at his own table, for his wife and all his children who had attained the age of twenty-one years, wine to drink, if he gave it to a son or daughter under twenty-one years of age he would be liable to the penalties of the law. And if one of his guests was under twenty-one years of age he would also be liable. The title of the act and all its provisions should be read together. When this is done, we cannot persuade ourselves that such a case as was made against the respondent brings him within its provisions.

The conviction is reversed, and a new trial ordered.

Carpenter, Montgomery, and Hooker, JJ., concurred.

Grant, J., did not sit.

On the Sale of Intoxicating Liquor to an infant where the parents give their consent, see Pressly v. State, 114 Tenn. 534, 108 Am. St. Rep. 921; and on the sale of liquor to a minor in ignorance of his minority, see People v. Curtis, 129 Mich. 1, 95 Am. St. Rep. 404. If an adult, accompanied by a minor, applies to a seller of liquors for liquor to be drunk at his expense for both himself and the minor, and the dealer furnishes it to be used by both, he is guilty of dealing or trafficking in intoxicating liquor with a minor: Nelson v. State, 111 Wis. 394, 87 Am. St. Rep. 881.

WARE v. HALL.

[138 Mich. 70, 101 N. W. 47.]

HOMESTEAD—Vacant Lot—Occupancy.—A person who is insolvent, and without any prospect of obtaining money to build a house, cannot indefinitely hold a vacant lot as a homestead which she has occupied only by raising vegetables thereon. (p. 303.)

HOMESTEAD.—Intention Without Occupancy cannot create a homestead, for the law requires occupancy, as well as intention. (p. 303.)

John J. Sterling, for the complainant.

Harris S. Whitney, for the defendant.

[70] GRANT, J. The object of this bill is to cancel an execution levy made upon a vacant lot in Benton Harbor, which complainant claims as a homestead. The sole question presented by the record is whether she had taken sufficient steps to establish and maintain this lot as a homestead. She formerly lived in Kalamazoo, where she owned a lot and a small house, in which we may infer (though it does not clearly appear upon the record) that she lived. In [71] September, 1899, she sold that house and lot for three hundred and seventy-five dollars, out of which she paid a mortgage upon them for two hundred and fifty dollars. She then moved to Benton Harbor, where some of her children were living. While living there with her son she purchased the lot in question, for which she paid one hundred and fifty dollars. She is a widow having four children, all of whom are married. She testified that they contributed a little toward her support. Subsequently she rented a house of the defendant, failed to pay the rent, and he brought suit therefor, obtained a judgment, and levied upon this lot in June, 1903. The lot was vacant when purchased, and was never occupied by her in any other manner or for any other purpose than to raise some vegetables upon it during the summer. It does not appear that it was fenced. Her son set out two small maple trees for her in front of the lot, but not at her request. She afterward paid him forty cents apiece for them. There were also two or three peach trees upon the lot. She had no money with which to build a house or even to pay her rent. She never made any plans for building, and testified that the reason was that she was too poor.

Where one buys a piece of land with the intention of soon thereafter erecting a building thereon for the sole purpose of a homestead, there is reason in holding that such land comes within the protection of the constitution as a homestead, and that he will have a reasonable time in which to erect the building. That is not this case. For three years and a half complainant had owned this lot. It could not exist indefinitely as a homestead in her intention alone. Something must be done within a reasonable time towards making it such a homestead. There was no such occupancy as, under any of the decisions cited, has been held to constitute a homestead. From her own testimony there was no immediate [72] or remote prospect that she could erect a house. She testified that her son, who was a carpenter, said that some time when he got able

he would erect a house on the lot and give it to her. That was the only prospect she had. The facts are entirely different in the cases relied upon: Reske v. Reske, 51 Mich. 541, 47 Am. Rep. 594, 16 N. W. 895; Deville v. Widoe, 64 Mich. 593, 8 Am. St. Rep. 852, 31 N. W. 538; Mills v. Hobbs, 76 Mich. 126, 42 N. W. 1084; Corey v. Waldo, 126 Mich. 706, 86 N. W. 122.

Corey v. Waldo comes nearest to sustaining the plaintiff's contention. But in that case the defendant and his wife were "proceeding as rapidly as circumstances would permit" to convert a homestead, which had been condemned by the city of Detroit for the purpose of opening a street, into another homestead composed of the lot which had been levied upon. Mr. Waldo was able to erect buildings thereon as a homestead, and we held that the reasonable time for him to carry that intention into effect by the occupancy which the constitution and law require had not expired. Here the naked question is, Can one utterly insolvent, without any ability to earn money sufficient even to support herself, without any prospect of getting money to erect a building thereon, hold land indefinitely as a homestead? To so hold would be in direct opposition to the language of the constitution and the law, which require ownership and occupancy combined. In all the cases cited, except possibly Corey v. Waldo, 126 Mich. 706, 86 N. W. 122, there were some acts of occupancy. Intention without occupancy cannot create a homestead, for the constitution requires occupancy as well as intention. There must be some acts which, coupled with the intention, constitute the necessary occupancy.

Decree reversed, and bill dismissed.

The other justices concurred.

On the Necessary Intention and Occupancy of a homestead claimant, see Gill v. Gill, 69 Ark. 596, 86 Am. St. Rep. 213, and cases cited in the cross-reference note thereto; O'Brien v. Wooltz, 94 Tex. 148, 86 Am. St. Rep. 829, and authorities cited in the cross-reference note thereto. Homestead rights attach to a lot which has been purchased for a homestead, if the purchaser proceeds in good faith to erect a residence thereon, although he has not yet occupied it, and it will not be fit for occupancy until a house is built: Cameron v. Gebhard, 85 Tex. 610, 34 Am. St. Rep. 832.

POPP v. CONNERY.

[138 Mich. 84, 101 N. W. 54.]

MARRIED WOMEN—Building Contracts—Agency of Husband.—Where houses are erected on the land of a married woman, she is liable for the value of materials selected by her and used in the construction of the buildings, although her husband, with her knowledge, purchases the materials, and the vendors, without any misrepresentation on his part, suppose him to be the owner of the land. (pp. 305, 306.)

Eugene Wilber, for the appellants.

James H. Davitt, for the appellee.

[84] GRANT, J. The defendant was erecting some houses on some lots owned by her. The contracts for their construction were made mainly by her husband in his own name. The business was mainly conducted by him, though she frequently gave instructions. The circumstances surrounding the construction of the buildings are fully stated in Brand v. Connery, 132 Mich. 88, 92 N. W. 784. Plaintiffs sold a bill of hardware for use in the construction of the houses. Her husband made the contract with plaintiffs. The goods were charged to him in the belief (though the husband made no representation of ownership) that the land was owned by him. By direction of the husband plaintiffs sent samples to the home of Mr. and Mrs. Connery for her selection. She selected them, and the price was agreed upon. The husband became insolvent and unable to pay. Plaintiffs, upon learning that the title was in defendant, then charged the goods to her, and, upon her refusal to pay, brought this suit. The court directed a verdict for the defendant. [85] The sole basis for recovery is stated by plaintiffs' counsel to be the fact "that the defendant owned the land, that she knew the buildings were to be erected, that she wanted them built, that she selected the materials, that they were taken to her home expressly that she might make the selections, that she agreed upon the prices, that she gave directions to the architect and builders, and that by the erection of these dwellings the value of her land was increased from one thousand dollars to ten thousand dollars." Plaintiffs rely upon Frolich v. Carroll, 127 Mich. 561, 86 N. W. 1034, and the authorities there cited. Defendant's counsel rely upon Holmes v. Bronson, 43 Mich. 562, 6 N. W. 89; Morrison v. Berry, 42 Mich. 389, 36 Am. Rep. 446, 4 N. W. 731; Hillier v. Eldred, 91 Mich. 54, 51 N. W. 705, and other similar cases.

In Holmes v. Bronson, 43 Mich. 562, 6 N. W. 89, a furnace was sold to the husband and placed in his wife's house. The husband gave his note for the purchase price, paid a part of the principal and interest, and obtained several renewals. After the last renewal, learning that the title to the land was in the wife, the plaintiffs returned the husband's note and sued the wife.

In Morrison v. Berry, 42 Mich. 389, 36 Am. Rep. 446, 4 N. W. 731, the husband bought a gas machine, which was attached to the house owned by the wife, on representation that he owned the house. Upon learning that the representation was false, the vendors tendered back the note which the husband had given, demanded possession of the machine, and, upon refusal, brought an action of trover. The majority of the court held that the action could not be maintained, for the reason that there was no evidence to show that Mrs. Morrison had any knowledge of even the existence of a contract, or that she did any act whatever to afford any ground of action against her. Justice Cooley dissented.

In Hillier v. Eldred, 91 Mich. 54, 51 N. W. 705, a son bought a frame of a barn to put up on his mother's homestead, intending to make her a present of it.

[86] In Frolich v. Carroll, 127 Mich. 561, 86 N. W. 1034, the contract to erect houses upon the wife's land was made by her husband. The contractor testified that he signed the contract upon the representation that the husband owned the premises. The chief difference between that case and this lies in the fact that Mr. Connery made no express representation as to the title. It was claimed there, as here, that there was not a scintilla of evidence to show any contract with the wife. The court found that the contract was in fact made on behalf of the wife, and in sustaining the conclusion of the court below we said: "Margaret Carroll owned the land, she knew the buildings were to be erected thereon, she wanted them built, she used funds of her own and borrowed more to pay upon the contract, she drew her own personal checks to the complainant and other contractors, and she still owns the premises. She thereby recognized the contract as hers. The case is like any other case of contract made by an agent where the principal is undisclosed"; citing authorities.

It is clear from this record that the husband was making no presents to his wife. He was attending to her business

in the same manner as any husband under like circumstances would attend to his wife's business. She knew he was doing this for her. While she did not herself make the application for the articles furnished by plaintiffs, she was present when the contract was made. She knew it was being done for her benefit, and to increase her property. Neither she nor her husband were produced as witnesses. Her husband was not purchasing a single article, like a gas machine or a furnace, but was purchasing materials to be used in the construction of her houses, and she knew that he was doing so. We think the case falls within the principle of Frolich v. Carroll, 127 Mich. 561, 86 N. W. 1034, instead of the other cases above cited.

Judgment reversed, and new trial ordered.

The other justices concurred.

Where a Wife Assents to a Contract made by her husband for materials to be used in the erection of a building on her separate estate, and knowingly receives them and assents to their application to her property, she is bound by such contract: Bodey v. Thackara, 143 Pa. St. 171, 24 Am. St. Rep. 526. And a wife is liable for materials which go into her house, when they are sold and delivered to her husband upon his credit, under the belief that he is the owner of the house, when it subsequently appears that he was acting merely as her agent: Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436.

MORRILL v. MORRILL.

[138 Mich. 112, 101 N. W. 209.]

TENANCY BY ENTIRETIES—Right of Wife to Crops.—A wife has no right to a share of the crops growing on land held by herself and husband as tenants by the entirety. She cannot compel him to account for a share of such crops when they are living apart. (p. 307.)

TENANCY BY ENTIRETIES—Right of Wife to Profits.—A Verbal Agreement between husband and wife that she shall have an equal share in the profits arising from land held by them as tenants by the entirety is unenforceable. (p. 310.)

Thomas J. Cavanaugh and L. A. Tabor, for the complainant.

W. G. Howard and A. L. Free, for the defendant.

112 CARPENTER, J. The parties to this suit are husband and wife. They were married about thirteen years ago. In

December, 1901, they separated, and shortly afterward defendant filed a bill for divorce, which, upon a hearing, was dismissed. They own eighty acres of land as tenants by the entirety, upon which, in 1903, complainant had a crop of grapes. Defendant undertook to harvest this crop. Complainant filed this bill to enjoin such action. Defendant filed a cross-bill averring that she contributed the money [113] for the purchase of this property under a verbal agreement that, while the title should be taken as it was, she should have an "equal share in the profits arising from said premises." Upon this ground, as well as upon the ground that she had a similar right as a tenant by the entirety, she prayed for an accounting, and that the property be placed in the hands of a receiver. The controversy was heard by the lower court, and the prayer of this cross-bill granted.

Two questions are raised by this appeal: 1. Has the wife a right to a share of the crops growing on lands held by her and her husband as tenants by the entirety? If the wife has a right to compel her husband to account for a share of the crops on land held by entireties when they are living separate, as in this case, she cannot be denied that right when they are living together. If she has such a right, it becomes important to determine where she obtained it. The common law certainly gave her no such right; for, according to its principles, the exclusive right to dispose of the crops and use the proceeds as he saw fit belonged to the husband: See Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361. It follows, therefore, that if the wife has that right now she obtained it as the result of some statute of this state. The only statute which it can be claimed has any bearing upon this subject is our married women's act: 3 Comp. Laws, sec. 8690. I think it must be conceded that the decisions of this court have determined that this statute has no application to estates by entirety: See Fisher v. Provin, 25 Mich. 347; Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; Speier v. Opfer, 73 Mich. 35, 16 Am. St. Rep. 556, 40 N. W. 909, 3 L. R. A. 52; Naylor v. Minock, 96 Mich. 182, 35 Am. St. Rep. 595, 55 N. W. 664; Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80; Doane v. Feather's Estate, 119 Mich. 691, 78 N. W. 884. I think it unnecessary to determine whether the husband's exclusive control of these crops is an incident of

estates by entirety, or whether, as held in Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762, 39 N. E. 337, 30 L. R. A. 305, and Buttlar v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695, it is the result of the marital unity. If [114] it is an incident of estates by entirety, then since under our decisions, estates by entirety remain as at common law, that right continues to belong to the husband. If it is a result of the marital unity, the same conclusion must be reached, because we have held—as we were bound to hold—that the statute does not affect the marital unity: See Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302. And accordingly we have—as we were bound to do—rejected the authority of Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762, 39 N. E. 337, 30 L. R. A. 305, and Buttlar v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695. See Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80. We are compelled to conclude from this reasoning that as a tenant by the entirety the wife has no such interest in the crops as to justify the decree complained of. It is contended, however, that the decision of this court in Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80, justifies the decree. In that case it was held that no interest in growing crops upon land held by husband and wife as tenants by the entirety was subject to seizure on an execution issued to collect a judgment against the husband; that the levy could not be supported either upon the ground that the husband owned the entire crops or on the ground that as a tenant in common he owned an interest of one-half therein which was subject to seizure. This decision proceeded upon the ground that estates by entirety at the common law continued to exist in this state, and that (quoting from Patton v. Rankin, 68 Ind. 245, 34 Am. Rep. 254) "a crop raised on land held by a husband and wife by entireties is held by them in the same manner and subject to the same law as the land itself, and such crop is therefore not subject to levy and sale on an execution against the husband." To argue that Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80, is an authority for the proposition that the wife has an interest in the crops which she did not have at common law is to argue that the conclusion reached in that case compels us to reject the premise upon which it is founded. Such an argument cannot be sound. Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80, is, in my judgment, an authority

against, rather than in support of, the proposition under consideration. It was there decided [115] that the husband has not—and this certainly means that the wife has not—such an interest in the crops that it might be taken on an execution. If the wife's interest in such crops cannot be taken on an execution, I do not think that it can be separated or set out to her on an accounting. I think that, construing Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80, as we are bound to do, in harmony with the former decisions of this court, the authority of which it recognizes, we are bound to say that, while the wife has such an interest in these crops that they cannot be taken on an execution against her husband, such interest does not interfere with his power of management, disposition, and control. Nor do I think it can be justly urged that this conclusion makes the right of the wife valueless. There may be instances—and perhaps this is one—where the wife needs legal protection from a cruel husband, who misappropriates property which in a moral sense may be characterized as a trust; but, after all, such instances are exceptional, and when they arise may ordinarily be dealt with in a suit for divorce. As a general proposition, it is of advantage to the wife and to the family that no outside person shall have the right to interfere with a husband who may be safely trusted to dispose of the profits arising from such an estate according to his judgment. It may be conceded that it is anomalous to hold that the wife's interest in this property is sufficient to prevent its being taken on an execution against her husband, and at the same time it is not sufficient to enable her to use it for her own benefit. But this is by no means a conclusive argument. The truth is, estates by entirety are anomalous. It is anomalous to hold that a wife has such an interest in the profits of such an estate that they cannot be sold for her husband's debt and at the same time to hold that they cannot be taken for her debt. It would also be anomalous to hold, as we are asked by complainant, that a wife's interest in the crops raised upon a piece of land is subject to partition and separation, and at the same time to concede, as I think we must, that her interest in the land is not.

[116] 2. Can a wife make a binding verbal agreement with her husband that she shall have an equal share in the profits arising from land held by them as tenants by the entirety? If she can, then by an oral agreement the legal effect of the

deed is changed, and it is settled that "no parol proof can be admitted to give the deed a different effect than such as the words in it legitimately import": Jacobs v. Miller, 50 Mich. 126, 15 N. W. 42.

It results from this reasoning that the decree appealed from should be vacated, and complainant be given a decree in accordance with the prayer of his bill.

Moore, C. J., Montgomery and Hooker, JJ., concurred.

Grant, J., did not sit.

A Crop Raised on Land Held by a Husband and Wife by entireties is, according to Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568, held by them in the same manner and subject to the same law as the land itself, and is, therefore, not subject to levy and sale on an execution against the husband. See, in this connection, Hiles v. Fisher, 144 N. Y. 306, 43 Am. St. Rep. 762.

FROHLICH v. PENNSYLVANIA COMPANY.

[138 Mich. 116, 101 N. W. 223.]

CARRIERS—Agency Between Consignor and Consignee.—A consignor is the agent of the consignee in the shipment of goods, and whatever contract he makes with the carrier is binding upon the consignee. (p. 312.)

CARRIERS—Selection of Unsuitable Car by Shipper.—If a consignor selects for the transportation of goods sold a car which, by reason of defects discernible upon inspection, is unsuitable for that particular class of goods, the carrier is not liable for a loss of the goods due to the unsuitableness and defective condition of the car. (p. 315.)

Angell, Boynton, McMillan & Bodman, for the appellant.

Wilkinson & Younglove, for the appellee.

117 GRANT, J. There is no substantial disagreement as to the facts of this case. Plaintiff, doing business in Toledo, Ohio, purchased from the Heidencamp Mirror Company, of Springdale, Pennsylvania, a carload of plate glass, in boxes weighing from five hundred to three thousand five hundred pounds each. The glass was consigned and shipped by the defendant railroad company to the plaintiff f. o. b. Springdale, Pennsylvania, freight allowance; consignee to pay the freight at Toledo, and deduct same from purchase price.

The glass arrived in good condition. Plaintiff commenced to unload the car, and had removed one case. In attempting to remove the second, the iron roller upon which it was being moved plunged through the bottom of the car, causing a destruction of the contents of the case, weighing about three thousand five hundred pounds. The car was an old coal car, with a trapdoor in the center, opening downward for the purpose of dumping the load. It was worked with a chain, by which it was let down and raised up. In the bottom of the car were several holes. One or two of the plaintiff's witnesses testified that after it was unloaded they counted seventeen holes. The glass was stacked in the two ends of the car, leaving a vacant space of about eight feet in the center. This space had no holes, and to plaintiff's employés appeared solid when they commenced unloading. The holes were under the boxes, and after their removal its defective condition was apparent. There was evidence that the car was suitable for shipping lumber, coal, or brick, or anything that would not be top-heavy. It is substantially conceded that it was unfit for shipping glass. Plaintiff's manager testified that he did not think the car fit for hauling glass. One of plaintiff's foremen testified that he never saw a car of glass loaded on such a car. The car was received on August 14th by the Heidencamp Mirror Company, loaded with sand, and was unloaded in the afternoon of that day. It was loaded with glass on the 15th or 16th, and shipped on the 18th. All the witnesses in the case appear to agree that the car should not have been loaded with glass. The custom between the Heidencamp Mirror Company, and the defendant [118] was that the mirror company might take any of its cars which were consigned to that company when unloaded, without asking permission, and use them for shipping their products, provided they were suitable for their use. The car was selected and used by the Heidencamp Mirror Company in accordance with this custom. In furtherance of this understanding, the Heidencamp Company kept inspectors, whose duty it was to select and inspect the cars for shipping their products. One of them testified as follows: "My duty was to inspect the cars to be loaded with glass by the Heidencamp Mirror Company, and to have supervision of the loading and to reject any cars unfit for loading glass."

Another testified that he was the yard foreman of the Heidencamp Mirror Company, and—"My duties as yard

foreman for this company is the loading of cars—seeing to everything that goes in and out. I do not remember the shipping of a car loaded with glass to Edward Frohlich Glass Company at Toledo, Ohio. I load too many cars to remember each one. My duties include the inspection of cars, or the repairs, if any are necessary, before shipments are made. If the car is unfit for loading glass in any way, I report it, and reject it. It was part of my duty in August, 1902, to use cars from the railroad company, if any were needed in the business of the mirror company. Q. What was your custom about using cars which came in on your siding loaded with material consigned to the mirror company, and which you wanted to use? A. Mr. Agan told me that I could take Pennsylvania cars to load either east or west without asking express permission, and this is what I have been doing."

The freight agent for the defendant testified: "The general custom was for me to allow them to take P. R. R. cars to load east and west for shipments that were suitable for them. The only express request that was necessary was where it was a foreign car which could be loaded only in one direction, and which belonged to other roads, and which must be loaded in the direction of [119] the home route. There was no express request for this particular car."

The clerk for the defendant at Springdale testified: "My duties at that time were to keep record of the cars on the siding, and to look after the cars, and to see if they were in good condition. If we find a car in bad condition, we mark it in the book. The inspection I make of the cars is that I take just a quick glance at them. I look inside of it generally to see if it is loaded. If I find a car in bad condition in any way, I mark the car in bad condition in the book, and what the trouble is, and report it to Mr. Agan."

The above is all the testimony bearing upon the question. The sole act of negligence relied upon is that the defendant furnished an unfit car. The defendant requested the court to direct a verdict for it. This was refused, and the case left to the jury.

[120] 1. In a well-considered case by this court it was held that the consignor is the agent of the consignee in the shipment of goods, and that whatever contract he (the consignor) makes with the common carrier is binding upon the consignee: McMillan v. Railroad Co., 16 Mich. 79, 93 Am. Dec. 208. It was there said that the authority of the consignor to enter into

special contracts with the carrier is to be presumed, and the carrier is under no obligation to inquire into it. The same rule is held in Ryan v. Missouri etc. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589, where many authorities are cited.

Upon the record now before us there was an agreement between the Heidencamp Mirror Company and the defendant that the mirror company, from among the cars delivered to it upon its sidetrack, might select such as it should deem fit and suitable in which to ship its glass. There is nothing in this agreement contrary to public policy. The [121] mirror company knew the character and weight of the products it shipped, knew what kind of cars were suitable for that purpose, and agreed to assume the risk of selecting. Every freight-car is not suitable for the transportation of all kinds of products. A car suitable for the shipment of sand is not necessarily suitable for the shipment of cases filled with glass, and very heavy. An old coal-car, suitable for shipping coal or like material, is not necessarily suitable for the shipment of glassware. There was no guaranty on the part of defendant that all its cars were suitable, in form or structure, for the shipment of glass. Under the agreement the mirror company undertook to select such cars only as were suitable for its purpose. The plaintiff and consignee, under this record and the authorities above cited, were bound, under this agreement, by the acts of their consignor, the Heidencamp Mirror Company. If it selected a car unsuitable for the transportation of the goods sold, the only remedy for the consignee is against the consignor.

If this car had been furnished at the express request of [122] the consignor, and the defendant, knowing the purpose for which it was to be used, had furnished the car in response to such express request, the defendant would have assumed all liability for defects, and would not be permitted to say that the defects were open to the knowledge of the shipper, who therefore assumed the risk.

The rule applicable in the case before us is thus stated by the text-writers: "Where the shipper exercises his own judgment, is not deceived or misled by the carrier, and chooses a car for the transportation of his property, the carrier is not answerable for the sufficiency of the car, for in such a case he does not trust to the carrier, nor rely upon the duty of the carrier, but, on the contrary, freely exercises his right of choice, and relies entirely upon his own judgment, so that

there is no reason for affirming that the carrier was guilty of any wrong": 4 Elliott on Railroads, sec. 1480; Hutchinson on Carriers, sec. 295c; Chicago etc. R. Co. v. Van Dresar, 22 Wis. 511; Ross v. Troy etc. R. R. Co., 49 Vt. 364, 24 Am. Rep. 144; Harris v. Northern etc. R. R. Co., 20 N. Y. 232; 6 Cyc. 385.

[123] Under this record, it was error not to give the following request: "If the shipper seizes a car which has been delivered to it loaded with sand, and, on its own account loads it with a commodity for which it is unsuitable, and damage to the goods results, the railroad company is not liable on the ground of negligently furnishing an unsuitable car."

The learned counsel for plaintiff cite and rely upon Hunt v. Nutt (Tex. Civ. App.), 27 S. W. 1031. They say that case is on all-fours with this. The consignor in that case shipped a carload of meal. He asked for a car for the purpose. The car was furnished. It was, to all appearances, suitable. The meal was in fact damaged by some substance that smelled like creosote or "sheep dip." The company in that case furnished the car. Something had been previously shipped in it which caused the damage. The shipper had no choice of selection, had not agreed to inspect, and the defect was a hidden one. It is clear that the railroad company was liable.

In Pratt v. Ogdensburg etc. R. R. Co., 102 Mass. 557, a specific car, [124] at the shipper's request, was furnished to plaintiff for a specific purpose. It was defective. It was important to the plaintiff to ship his stock at once, rather than wait a week for better cars. He used the one furnished. It was defective, and there was evidence tending to show that he knew it. The court held that the carrier was bound to furnish a suitable car, and was not exonerated from liability, even though the plaintiff knew it to be defective, accepted and used it. It was said: "Nothing less than a distinct agreement by the plaintiff to assume the risk would have that effect."

It was also said: "If the plaintiffs expressly agreed to assume the risk of defective cars, rather than wait a reasonable time for other cars, they cannot recover."

This case was affirmed by the supreme court of the United States: Ogdensburg etc. R. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827. [125] If there had been other cars, and the plaintiffs in that case had been authorized to inspect and select one that was suitable, and they had chosen one that was un-

suitable, the obvious conclusion is that the court would have held the carrier not liable, provided the defects in the car selected were obvious. We are therefore of the opinion that the selection by the Heidencamp Mirror Company of unsuitable cars is binding upon it and its consignees, and that defects in cars suitable per se, which were so open as to be easily discernible upon inspection, were assumed by the plaintiff through the acts of its consignor.

2. The record in this case suggests another important question, but, as the case does not appear to have been tried upon that theory, and is not fully presented here, we decline to pass upon it. It is this: Assuming that the car upon which the goods were shipped was suitable in character and structure, and proper for use in the shipment of such goods, but was unsuitable and unsafe in [126] consequence of hidden defects, such as decayed flooring, or flooring of insufficient strength, would the defendant, under such circumstances, be liable? Or, perhaps, better stated thus: Did the arrangement for selection and inspection between the Heidencamp Company and the defendant impose upon the consignor the responsibility for hidden defects in cars otherwise suitable?

Reversed and new trial ordered.

The other justices concurred.

The Contributory Negligence of the Shipper of goods cannot be pleaded to relieve a negligent carrier from liability. The carrier is liable for any injury done through the concurrent and contributory negligence of himself and the shipper: McCarthy v. Louisville etc. R. R. Co., 102 Ala. 193, 48 Am. St. Rep. 29.

BYRNE v. WERNER.

[138 Mich. 328, 101 N. W. 555.]

FIXTURES—Building Materials Pass with Realty.—Where a lot on which stands a partially constructed building is conveyed, cut stone and structural iron lying on the lot and on adjoining land and intended for use in the completion of the building, pass with the conveyance. (p. 317.)

Ball & Ball, for the appellants.

Button & Culver, for the appellee.

[329] CARPENTER, J. Plaintiff brings this suit to recover for the conversion of certain cut stone and structural iron. The property originally belonged to plaintiff's father, Samuel E. Byrne. Both parties claim to have acquired his title. Plaintiff claims to have acquired it by a bill of sale executed in 1896. It is defendants' claim that in 1887 the property in controversy was transferred by Samuel E. Byrne to Henry C. Thurber, and that they have acquired Thurber's rights. It is clear that defendants have acquired the rights of Thurber, and that, therefore, the validity of their claim depends upon whether Byrne transferred the property to Thurber. The facts respecting the transfer are as follows:

In 1887 Byrne conveyed to Thurber by a warranty deed (intended to be a mortgage) lots 4 and 5 of block 17 in the city of Marquette. At that time there was situated upon these lots a partially completed building in the process of erection. There was also situated on the land conveyed and on an adjoining lot the cut stone and structural iron involved in this case, which was intended to be used in the completion of the building. The stone had been cut and dressed for the front of the building. Each piece of the structural iron was of the dimensions provided in the plan of the building, and fit for the place where it was to go. At that time it was intended that the building would be completed. The plan of completing the building was, [330] for some reason, abandoned, and defendants used the stone and iron for another purpose.

Did the title to that material pass to Thurber by his deed? The learned trial judge held that it did not. It is urged that the building material had not become a part of the land, and was, therefore, in a legal sense, personalty at the time of the conveyance to Thurber. If this be true, it is not, in my judgment, decisive of this controversy. Though the building material was personalty, it is our duty to declare that it passed with the partially completed building, if the parties so intended, and if that intent may be ascertained from a proper construction of the conveyance of the land upon which said building stood. The question is, then, not whether the building material was in fact personalty, but whether it was intended to transfer it with the conveyance of the partially completed building. And this intent is to be determined by a proper construction of the conveyance; that is (see Norris v. Showerman, 2 Doug.

16; Davis v. Belford, 70 Mich. 120, 37 N. W. 919), by applying the language of the conveyance to its subject matter. No uncertainty results from this rule. Upon the land conveyed to Thurber was an incomplete building in the process of erection. Situated upon that land and upon the adjoining land was building material designed to be used for the completion of the building. It was surely intended that the incomplete building should be transferred to Thurber. It was surely intended that the building would be speedily completed with the building material at hand. And I think it therefore equally certain that it was intended that such material should pass with the conveyance. In my judgment, there is no sound principle of law which compels us to defeat this intention. On the contrary, I maintain that it is our clear legal duty to give it effect. I think, therefore, that the building material became the property of Thurber. This conclusion is sustained by authority.

In Wistow's Case of Gray's Inn (14 Hen. VIII), 11 Coke, 50b, it was resolved that a millstone temporarily [331] severed from the mill, with the intention that it should be replaced, passed with the conveyance of the mill. "So of doors, windows, rings, etc. The same law of keys, although they are distinct things, yet they shall pass with the house."

In Conklin v. Parsons, 1 Chand. (Wis.) 240, it was held that rails placed along the boundary line, "not laid up into a fence, but which had been placed on the land for the purpose of building the fence," passed with the conveyance of the land.

In Ripley v. Paige, 12 Vt. 353, there was a controversy as to whether certain rails passed with the conveyance of land from plaintiff to defendant. Defendant offered to prove that when the conveyance was made the rails were distributed upon the farm for the purpose of being there erected into a fence. The court said: "Upon this branch of the case we are inclined to regard the rails, if it was evident from the manner of their distribution upon the land, and other appearances, that they were designated for immediate use in fencing the land, as we should the materials of a fence accidentally fallen down, or of one purposely taken down to be immediately reconstructed, or those of an intended wall distributed in like manner. As fences always pass by a deed of the soil on which they stand if the grantor has an unrestricted right to convey both, so we are disposed to think that such materials for a fence may, in

all these cases, as against the grantor, be treated as being within the operation of his deed."

In Hackett v. Amsden, 57 Vt. 432, it was held that stone posts, which it seems were deposited on a farm for the purpose and with the intention of building necessary fences, could not be seized and sold as personalty the court saying: "Whatever the rule may be elsewhere, it seems to be settled in this state that suitable materials, deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon, pass by a conveyance of the land as a part of the realty."

[332] In Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780, it was held that certain stanchion timbers, staples, tie chains and planks, which had been removed from a barn for the purpose of making repairs, passed to plaintiff by a conveyance from defendant of the land upon which the barn stood, notwithstanding the fact that the latter had formed a plan unknown to the former to make changes in the barn and to dispense with their use. The court said: "It was entirely immaterial what purpose the defendant had formed, so long as he had not carried it out. By the conveyance the barn passed to the plaintiff just as it then was, with portions afterward carried off by the defendant dissevered from the rest. The plaintiff saw the barn in the process of repair. He had a right to infer, and to act upon the inference, that the dissevered portions constituted an integral portion of the edifice."

In Palmer v. Forbes, 23 Ill. 301, it was held that the title to rolling stock and the material provided for the repair of tracks was transferred by a mortgage of the real estate of a railroad company the court saying: "It is a familiar principle to all that rails hauled onto the land designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose and in no way attached to the soil, are treated as a part of the realty, and pass with the land as appurtenances."

This decision and reasoning go further than it is necessary for us to go in the case at bar.

In McLaughlin v. Johnson, 46 Ill. 163, it was held that rails which had once been and which were intended to again be used for a fence passed with the conveyance of the land, notwithstanding the fact that at the time of such conveyance

they were actually in temporary use on adjoining land: See, also, Curtis v. Leasia, 78 Mich. 480, 44 N. W. 500.

Harris v. Scovel, 85 Mich. 32, 48 N. W. 173, is not inconsistent with these views. There it was held that rails piled on land did not pass with its conveyance. The rails had once formed part of a fence. The grantor had taken down the fence because it was no longer needed, intending to use 333 the rails elsewhere. It is clear that there was no ground upon which the grantee could assert that it was intended that the rails should pass with the land.

Johnson v. Mehaffey, 43 Pa. St. 308, 82 Am. Dec. 568, relied upon by plaintiff and the learned trial judge, is, in my judgment, clearly distinguishable from the case at bar. In that case it was held that rolls originally purchased to be put in a mill did not pass upon a conveyance of the mill. At the time of the sale these rolls had for nearly three years remained on the property, unused and in a rough, unfinished state. They were not necessary to the operation of the mill, for the mill had always run without them. This afforded a ground for saying that it was not intended that the rolls should pass to the purchaser of the mill. That ground does not exist in this case, for the building material in question was necessary for the completion of the building.

Woodman v. Pease, 17 N. H. 282, cited by plaintiff, is very similar to Johnson v. Mehaffery, 43 Pa. St. 308, 82 Am. Dec. 568, and is likewise distinguishable from the case at bar. It is true that the court in deciding each of these cases stated that personalty does not become a part of real estate until actually annexed thereto. If by this it was intended to assert that, notwithstanding the obvious intent of the parties, property originally personalty, will not, unless actually annexed thereto, pass on a conveyance of real estate, the court made a statement not necessary to its decision—which might have rested upon the intention of the parties concerned—and which, as already indicated, I cannot approve. Other cases cited by plaintiff are even more easily distinguishable.

In Cook v. Whiting, 16 Ill. 480, it was held that the "simple intention" of the vendor, before he sold his farm, to erect posts into a fence and hewed timber into a granary, without having done anything toward those objects more than to haul said posts and timber onto the farm, "is not sufficient to pass the property in said posts and timber."

[334] In Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392, the court gave effect to the obvious intention of the parties in deciding that certain property, viz., detached extra blinds and windows, did not pass with the sale of the house.

It was held in Carkin v. Babbitt, 58 N. H. 579, where the controversy arose between the owner and an attaching creditor, that lumber designed for the erection of a house was personalty. The facts in that case were very unlike those in the case at bar. The lumber was "neither in form nor position as it was designed to be permanently used." There was nothing "to distinguish it from ordinary lumber suitable for building purposes." Nor could the court apply in that case the principles applicable to a controversy between mortgagor and mortgagee.

I think, therefore, that the defendants were entitled to a verdict, and that the judgment should be reversed, with costs, and a new trial ordered.

Grant and Montgomery, JJ., concurred with Carpenter, J.

Chief Justice Moore Dissented, and with him Justice Hooker concurred. In delivering the dissenting opinion, Chief Justice Moore reviewed the facts involved and the opinion written by the trial judge, and then concluded as follows:

"We now come to the most difficult question in the case; that is, whether, as claimed by defendants, the court erred in the instruction given to the jury that the structural iron and stone did not become a part of the realty, and refusing the request of defendants' counsel on that subject. It must be confessed there is a good deal of conflict in the authorities. They are collated at length in 13 American and English Encyclopedia of Law, second edition, at pages 601 to 610, and in the notes thereto. We are impressed with the reasoning of Chief Justice Lowrie in Johnson v. Mehaffey, 43 Pa. St. 308, 82 Am. Dec. 568, from whose opinion Judge Stone quoted so copiously. There is an expression used in Curtis v. Leasia, 78 Mich. 480, 44 N. W. 500, by Justice Sherwood, that tends to support the claim of defendants but it is obiter dictum. The court held in the case that the rails which were claimed to be realty were not realty, but were personal property: See Harris v. Scovel, 85 Mich. 32, 48 N. W. 173. In this case it appears the defendants made new plans for a building, which rendered the structural iron and dressed stone unfitted for use therein. Was this material up to that time real estate, and from that time on personal property? If so, would the same result have followed had Mr. Byrne changed the plan of the building while he owned the property?

"We are inclined to agree with the trial judge as to the weight of authority, and that the judgment should be affirmed."

According to the Recent Case of Blue v. Gunn, 114 Tenn. 414, 108 Am. St. Rep. 912, doors, mantels, casings, columns, and the like, deposited in a building for the purpose of annexation, but never physically attached to it, are not fixtures so as to pass to a purchaser under a mortgage sale of the premises.

O'NEILL v. JAMES.

[138 Mich. 567, 101 N. W. 828.]

NEGLIGENCE—Sale of Explosive—Privity.—Where a bottler of champagne cider sells it without knowledge that the bottles are charged improperly, he is not liable to the buyer's employé who is injured by the explosion of one of the bottles. (p. 328.)

Gray, Haire & Stone, for the appellant.

P. H. O'Brien and W. A. Burritt, for the appellee.

567 MOORE, C. J. This is an action brought against the defendant to recover damages for the loss of an eye, which the plaintiff claims was caused by the negligence of the defendant. At the time of the injury the plaintiff was in the employ of his brother, in the capacity of bartender. 568 The defendant was a bottler of champagne cider, and had been for twenty years prior to the injury. The liquid was charged with carbonic acid gas. Some time prior to February 28, 1902, the defendant sold a quantity of champagne cider to the plaintiff's employer, and the cider, when delivered, was put in the ice-box. On the twenty-eighth day of February, 1902, the plaintiff took a bottle of said cider out of the ice-box, and claims that while holding it in his hand, and before any force was applied to it, the bottle exploded, and was blown into a large number of fragments, and a piece of the glass from the bottle struck plaintiff in his eye and destroyed it. The plaintiff recovered a substantial judgment. The defendant has brought the case here by writ of error.

At the conclusion of plaintiff's proofs, and also when the testimony was all in, defendant asked the judge to direct a verdict. This the judge declined to do. A motion was then made for a new trial. In denying that motion, the trial judge states the theory of the parties substantially as follows: "The pleadings which made the case, which was left to the jury, asserted on the part of the plaintiff that the

defendant negligently had sent out an article, in itself dangerous, in place of one in itself safe; that the article furnished by the defendant was a dangerous explosive. The defendant in the case attempted to show that champagne cider—the liquid furnished by the defendant—was a non-intoxicating, harmless drink. The plaintiff made no attempt to show that any deleterious or poisonous substance was put into the liquid, so as to render it at all harmful as a drink; but the plaintiff introduced testimony which he claims tended to establish that the champagne cider sent out by the defendant had become a dangerous explosive, and that it had so become through the negligence of the defendant. The question to be determined on this motion are whether there was evidence to sustain the case made by the pleadings on the part of the plaintiff, sufficient to cause the case to be submitted to the jury, and, if there was, whether the verdict of the jury is against the clear weight and preponderance of the evidence. Before the plaintiff rested, he introduced testimony to show that he [569] had sustained an injury by the explosion of a bottle of champagne cider which was manufactured and furnished by the defendant. There was also testimony on the part of experts, without objection on the part of the defendant, that champagne cider, manufactured in the usual way, with the ordinary pressure, was safe. There was also testimony that, if the pressure was increased beyond a certain limit, then the article became dangerous, and dangerous because of the likelihood of an explosion. The experts also testified that an explosion would not occur, under the circumstances as detailed in this case, unless the bottle had been overcharged, and would be likely to occur, had the bottle been overcharged.

"The defendant introduced testimony to show that he had been engaged in the manufacture of champagne cider for a long term of years; that he had never known a bottle to explode under similar circumstances to those testified to on the part of the plaintiff; that the gas with which the water used in making the champagne cider was charged was explosive. The defendant testified that he had never charged champagne cider at a pressure greater than sixty pounds for commercial purposes. His bottler (the one who charged the bottle which caused the injury to O'Neill) had been in his employ some ten years, engaged

in the same work. The testimony on the part of the defendant and the testimony on the part of the plaintiff tended to show that the apparatus used by the defendant was the ordinary equipment of such establishments. The defendant urged that the testimony was uncontradicted that no champagne cider was ever bottled by him for sale at a pressure higher than sixty pounds to the square inch, and that there was no evidence whatever of any negligence on the part of the defendant. While the testimony of the defendant and of his bottler was positive that no champagne cider had ever been bottled for sale at a higher pressure, if there were other testimony in the case from which a jury might reasonably infer that this pressure had been exceeded, the question became one which ought to be submitted to the jury for its decision. Opposed to this testimony was the testimony of the experts, in which they maintained that the explosion could have occurred for no reason other than an overcharge."

It was the claim of defendant the explosion, instead of 570 being caused by an overcharge, might have been caused as follows: 1. The contact of the human hand with the cold bottle taken from the ice-box, upon a small area of the cold glass, would have caused a sudden expansion of the small area of the glass, and a consequent cracking of the bottle; 2. The warm air of the room might have caused the same result, independent of the hand; 3. The pressure brought to bear upon the bottle by inserting its neck into the socket of the corkscrew, or by striking the bottle on the corkscrew; 4. Perchance a cracked bottle from some other cause; 5. A bottle inherently weak by reason of varying thickness of glass, or the like.

We think, with reference to the question of negligence, the court was right in holding that, in view of the testimony upon this branch of the case, the issue should be submitted to the jury: See Merryman v. Hall, 136 Mich. 296, 99 N. W. 27; Schoepper v. Hancock Chemical Co., 113 Mich. 585, 71 N. W. 1081.

There is, however, a much more serious question in the case. The testimony on both sides is that champagne cider, bottled in such bottles as were used by defendant, at a pressure of sixty pounds or under, is a harmless ordinary article of commerce, usually kept for sale where soft drinks are sold. The record also discloses that defendant did not himself

charge the bottle which did the mischief. There is nothing to indicate he ever saw it. The testimony of the bottler is that it was charged in the usual way, and sent out in the usual course of trade, and that he had no knowledge that it was improperly charged. Indeed, his testimony is that it was not improperly charged. There is no testimony tending to establish that defendant had any knowledge that the bottle was overcharged when it left his place of business, or from which an inference could be properly drawn that he had such knowledge. Under this state of facts, counsel for defendant claim: "The point we raise is that where one is engaged in the manufacturing and selling of an article of commerce harmless in itself, as the proofs show that champagne [571] cider is, when manufactured and bottled in the ordinary manner, he cannot be held liable to a third person, who stood in no privity of contract with him, because perchance one bottle did, for some reason, burst, in the absence of proof of knowledge of vendor of the defect."

In reply to this claim, counsel for plaintiff say: "The defendant contends that the plaintiff cannot recover because there was no contractual relation between the parties. It seems to us that it is a sufficient answer to this contention to say that if the defendant knowingly or negligently sent out an article which was of itself a dangerous explosive, and it exploded in the hands of the plaintiff, and injured him, without fault on his part, the defendant is liable, whether there was any contractual relation between the parties or not. If the defendant knew the bottle to be a dangerous explosive, or by proper care on his part could have known it, he is liable. The duty of the defendant was not a duty which he owed to the purchaser only, but which he owed to every person in whose hands the article might pass—a duty which he owed the public."

Plaintiff cites a number of cases in support of his proposition, the first of which is Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797. This case arose on demurrer, and we quote from it at length: "The next question is, Does the complaint state facts sufficient to constitute a cause of action? Stripped of its verbiage, the complaint alleges that the respondents manufactured, sold and delivered to one Pratt, under the name of 'champagne cider,' a dangerous explosive, knowing it to be such, without warning Pratt of its dangerous character, or placing on the bottle contain-

ing the substance anything to indicate that it was a dangerous explosive, and that the appellant, while in the employ of Pratt, and engaged in his duties as such employé, and without fault or negligence on his part, was injured by an explosion of the substance. Paragraph 5 of the complaint was as follows: 'That the injuries to said plaintiff were caused by the willful negligence, carelessness, and want of proper care on the part of the defendants, D. Holzman & Co., by reason of said defendant willfully, [572] carelessly and negligently, and for want of ordinary care in the manufacturing, bottling, preparing and selling of said champagne cider, in this: That the said defendants failed to manufacture, bottle, and prepare the said champagne cider in the proper degree of temperature; failed to properly charge the said champagne cider with the proper amount of carbonic acid gas and other substances used in the manufacturing and bottling of the same; failed to properly test said bottle as to its strength and endurance to hold said champagne cider; failed to properly label said bottle as to its being an explosive and dangerous substance; failed to explain to the said M. L. Pratt, or said plaintiff, or anyone else, of the danger in handling and using said bottle of champagne cider, and the cause for any probability of its exploding and injuring those who came in contact with the same.'

"The prayer was for damages in the sum of ten thousand dollars. The record does not advise us as to the ground upon which the trial judge sustained the demurrer, but the respondents urge against its sufficiency two principal contentions, the first of which is that the allegations of negligence are so indefinite as to be meaningless, and the second that there is no casual connection between the negligence alleged (conceding the allegations sufficient) and the injury complained of. The argument that the allegations of negligence are so indefinite as to be meaningless is based upon recitals in the paragraph above quoted. It seems to us, however, that the complaint states a cause of action without that paragraph, and hence it is not very material to inquire just how definite this particular one should have been made; but, conceding it otherwise, we do not think the allegations susceptible to a general demurrer. Clearly, the acts recited therein, when taken with the other acts recited in the complaint, constitute actionable negligence; and, if more particularity of statement was desired and

could be required, the remedy was by a motion to make more definite and certain, not by a general demurrer.

"The second objection seems to us to be equally without merit. One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby. The rule does not rest upon any principle of contract or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation [573] between them. It rests on the principle that the original act of delivering the article is wrongful, and that every one is responsible for the natural consequences of his wrongful acts. The rule that liability exists in such cases is abundantly supported by authority. In Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, it was held that a manufacturer of drugs, who had sold a druggist extract of belladonna under the label 'Extract of Dandelion' was liable to a person injured thereby, who had procured it of the druggist on a physician's prescription calling for extract of dandelion; it appearing that neither the druggist nor the person taking it knew that it was other than it was labeled. In Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298, it was held that an apothecary who had negligently sold a deadly poison for a harmless medicine called for was liable for the death of the purchaser's servant, to whom it was administered, at the suit of the servant's administrator.

"In Wellington v. Downer Kerosene Oil Co., 104 Mass. 64, the principle governing the liability was stated in the following language: 'It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault.'

"So in Lewis v. Terry, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, 31 L. R. A. 220, it was said: 'We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article

actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts.' See, also, 1 Shearman & Redfield on Negligence, 5th ed., sec. 117; Blood Balm Co. v. Cooper, 883 Ga. 457, 20 Am. St. Rep. 324, 10 S. E. 118, 5 L. R. A. 612; [574] Schubert v. J. R. Clark Co., 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, 15 L. R. A. 818; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; Elkins v. McKean, 79 Pa. St. 493; 12 Am. & Eng. Ency. of Law, 2d ed., p. 508, subd. 6."

It will be observed that, where no contractual relations exist, the doctrine is recognized that there must be knowledge of the dangerous character of the thing sold, before defendant can be held liable, and this doctrine is recognized in all the cases to which our attention has been called. Counsel for defendant cite many cases in their brief in support of their contention. We deem it necessary only to cite Guinea v. Campbell, 22 Quebec Official Law Rep. 257, and Glaser v. Seitz, 35 Misc. Rep. 341, 71 N. Y. Supp. 942. We quote from the last-named case: "Siphons of seltzer water, like the one that exploded, are in common use, and have been manufactured and sold in this city and elsewhere for many years. They are certainly in as common use as steam boilers and gas, and an explosion of a steam boiler or of gas does not necessarily create an inference of negligence sufficient to fix liability on the defendant. The plaintiff, even in such cases, must go further, and prove affirmatively the existence of some defect in construction or condition of the thing which contains the gas or steam, of which the defendant was cognizant, or which he ought to have known by the exercise of proper care in the premises. There is no evidence in this case that the bottle, which was not manufactured, but filled, by the defendant, was not properly constructed, or that it was constructed differently from bottles in which seltzer water is usually sold. Nor is there any evi-

dence that the manner of putting the water in was different from the method in common use, or that the character of the liquid was different from that usually put into such bottles. Gunpowder, dynamite, turpentine, gas, fireworks, and many other explosives are used in the community as merchandise necessary in proper places and for certain purposes and no one can contend that the sale of these commodities constitutes negligence on the part of the vendor, when the articles are sold by their proper name, indicating their character. There are cases in the books where articles have been sold as apparently harmless, and have turned out to be dangerous and inflicted damages, and the vendor has in consequence been held liable. For [575] example, where naphtha, which is of an explosive character, was sold for oil, and injury resulted. There the defendant was held liable for the deceit. There is no pretense in this case that the siphon of the seltzer water sold was misnamed, or that any deceit was practiced on the plaintiff. Indeed, it was an ordinary, well-known article of merchandise, sold in large quantities every day. It is common knowledge that bottles containing seltzer or vichy water or champagne or ginger ale or cider will sometimes explode, and that barrels containing cider may explode. But it does not necessarily follow that the vendor of these commodities in such bottles or barrels is liable for the explosion, in the absence of misconduct on his part, which misconduct must be affirmatively proved. For want of such proof, the complaint must be dismissed. Complaint dismissed."

The plaintiff knew that champagne cider, as ordinarily manufactured and sold, was charged with a gas. As we have before stated, there is no proof from which the inference might be drawn that defendant had knowledge that the bottle was improperly charged. The proof offered on the part of plaintiff, as well as that offered on the part of defendant, is that the apparatus used by the employé was a proper one. Under the facts disclosed by the record, a verdict should have been directed in favor of defendant.

The judgment is reversed, and a new trial ordered.

The other justices concurred.

A Discussion of the Principles involved in the principal case will be found in the monographic note to Woodward v. Miller, 100 Am. St.

Rep. 192-203; and in the recent case of Watson v. Augusta Brewing Co., 124 Ga. 121, ante, p. 157. For a decision involving facts very similar to those in the principal case, see Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932.

FISCHER v. UNION TRUST COMPANY.

[138 Mich. 612, 101 N. W. 852.]

DEED OF GIFT—Sufficiency of Delivery—Failure to Record.—Where the grantor in a deed delivers it to the grantee, and she hands it to her brother, asking him to take care of it, and he puts it in his safe without recording it, the delivery is complete. (p. 330.)

DEED OF GIFT—Grantor's Covenant to Pay Mortgage.—Where a father by warranty deed conveys land to his daughter, the only consideration therefor being love and affection, and the deed covenants against all encumbrances excepting two mortgages which he "agrees to pay when due," his agreement is not enforceable for want of consideration, and if he fails to pay the mortgages in consequence of which they are foreclosed, she has no claim for damages against his estate after his death. (p. 335.)

Bertha Fischer presented a claim against the estate of William Fischer, deceased, for damages for an alleged breach of a covenant in a deed. From a judgment for her on a verdict directed by the court the defendant brings error.

Russell & Campbell, for the appellant.

Alfred J. Ducharme and John C. Donnelly, for the appellee.

612 GRANT, J. On December 21, 1895, William Fischer, Sr., conveyed by warranty deed certain property in the city of Detroit to the claimant, Bertha Fischer, his daughter, who had been incompetent for a number of years, and so remains, and is at present at the retreat for the insane at Dearborn. 613 The deed was a warranty deed, in the usual form, with a covenant against all encumbrances, excepting two mortgages, which the grantor "agrees to pay when the same become due." The land described in the deed comprised the homestead where the father and daughter lived, and the adjoining lot, with the house thereon. Mr. Fischer, after signing and acknowledging it, handed it to claimant, saying, "Here is a deed of the Jefferson and Larned street property." He said it was a "nice Christmas present." She took it and read it. One of her brothers gave her a dollar, which she gave to her father, who took it. She then handed the deed to her brother Alexander, and asked

him to take care of it. He put it in his safe, and did not record it until June 30, 1902, about a year after the grantor's death, and six and one-half years after its date. The reason given by the son for not recording is that there were unpaid taxes, in consequence of which, under the statute, it could not be recorded.

After the delivery of the deed, both grantor and grantee continued to live together on part of the property so conveyed. Mr. Fischer continued until his death to manage and control it, and to receive the rents therefrom, just as he had done before the giving of the deed. During that time he took care of his daughter the same as before. At the time of the execution of the deed, the grantor was considered by his sons to be worth about fifty thousand dollars. He had no debts except the two mortgages, one of three thousand dollars and the other of five thousand dollars. If he was then worth that amount, the larger part of it was in some way disposed of it in his lifetime. The three thousand dollar mortgage was foreclosed for nonpayment, and satisfied out of part of the property conveyed. The claim at bar is based upon this appropriation of her property to pay the mortgage.

[614] 1. The facts and circumstances of the delivery of the deed are not in dispute. Counsel differ only in the conclusion to be drawn from them. We think that the conceded facts show a delivery. After the deed was signed and acknowledged, the grantor made manual delivery of it to the grantee. She took it and handed it to her brother, evidently to be kept by him for her. The grantor reserved no control over it, and retained no right to withdraw or cancel it. He never attempted to. Under those circumstances the delivery was complete.

2. The meritorious question in the case is: Was the claimant in position to enforce the executory contract in the deed against her father while living, and to enforce it against his estate now that he is dead, or to convey damages at law for nonperformance? To say that the one dollar was the real or such valuable consideration as would of itself sustain a deed of land worth several thousand dollars is not in accord with reason or common sense. The passing of the dollar by the brother to his sister, and by her to her father, was treated rather as a joke than as any actual consideration. The real and only considera-

tion for the deed and the agreement, therein contained, to pay the mortgages, was the grantor's love and affection for his unfortunate daughter, and his parental desire to provide for her support after he was dead. The consideration was meritorious, but is not sufficient to compel the performance of a purely executory contract. The deed was a gift, and the gift was consummated by its execution and delivery. The title to the land, subject to the mortgages, passed as against all except the grantor's creditors. The gift was expressly made subject to the mortgages, and coupled with it was a promise to pay them. This promise has no additional force because it is contained in the deed. It has no other or greater force than would a promise by him to pay mortgages upon her own land, or to pay her eight thousand dollars in money, or his promise to her evidenced by a [615] promissory note for a like amount, and given for the same purpose and the same consideration.

"The doctrine of meritorious consideration originates in the distinction between the three classes of consideration on which promises may be based, viz., valuable consideration, the performance of a moral duty, and mere voluntary bounty. The first of these classes alone entitles the promisee to enforce his claim against an unwilling promisor; the third is for all legal purposes a mere nullity until actual performance of the promise.

"The second, or intermediate class, is termed the meritorious, and is confined to the three duties of charity, of payment of creditors, and of maintaining a wife and children; and under this last head are included provisions made for persons, not being children of the party promising, but in relation to whom he has manifested an intention to stand in loco parentis in reference to the parental duty of making provision for a child.

"Considerations of this imperfect class are not distinguished at law from mere voluntary bounty, but are to a modified extent recognized in equity. And the doctrine with respect to them is that, although a promise made without a valuable consideration cannot be enforced against the promisor, or against anyone in whose favor he has altered his intention, yet if an intended gift on meritorious consideration be imperfectly executed, and if the intention remains unaltered at the death of the donor, there is an equity to enforce it, in favor of his intention, against per-

sons claiming by operation of law without an equally meritorious claim": Adams on Equity, 8th ed., 97.

This court held that a promissory note given by a father to his son, intended as his share of the estate, could not be enforced against the estate: Conrad v. Manning's Estate, 125 Mich. 77, 83 N. W. 1038. The opinion in that case, written by my Brother Moore, cites many authorities which need not be recited here. Duvoll v. Wilson, 9 Barb. 487, is exactly in point, both in the facts and conclusion reached.

"The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood or natural love and [616] affection—there must be something more, a valuable consideration, or it is not good and cannot be enforced at law, but may be broken at the will of the party": Pennington v. Gittings, 2 Gill & J. 208. See, also, West v. Cavins, 74 Ind. 265; Hadley v. Reed, 12 N. Y. Supp. 163.

The learned counsel for the claimant cite numerous authorities, but we do not think them applicable to this case.

In Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. 885, a father had deeded to his daughter a lot of land according to a plat which called for a street thereon. The rights of the grantee in the street were the subject of the suit. One of the defenses set up was, the conveyance was voluntary. To this contention the court replied that the conveyance was fully executed. That decision is based upon the obvious principle that, when a grant of land or gift of personalty is consummated by a deed of the land or delivery of the personalty, the grantee or promisee succeeds to all the rights in the property which the grantor or promisor had. Third parties, except creditors, cannot contest the consideration.

So, where the contract of conveyance is fully executed, the grantee may maintain a suit in equity to correct the description in the deed: Hutsell v. Crewse, 138 Mo. 1, 39 S. W. 449. In that case the father deeded to his minor child the land for the same purpose as did Mr. Fischer in this case. He had also deeded certain other lands to his other children. His wife died, after which he remarried. After his death, suit was brought against the widow and her children to reform the deed. The basis of the decision is that the contract was executed, the title had passed, and the land was susceptible of identification aliunde. Pickett v. Garrard, 131 N.

C. 195, 42 S. E. 579, Mason v. Moulden, 58 Ind. 1, Brown v. Whaley, 58 Ohio St. 654, and Ohmer v. Boyer, 89 Ala. 273, 7 South. 663, are similar cases.

In Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326, the consideration was the sum of one dollar and the extension of credit, which was held sufficient to sustain a contract of guaranty for the payment of accounts.

617 In Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519, the consideration was natural love and affection. Creditors attacked the conveyance on the ground of fraud. It was held that the deed was not per se voluntary. The question in the case was whether it was competent to show that full value was paid by the grantee. The holding of the case clearly is that love and affection would not be a sufficient consideration to sustain the deed.

In Ross' Appeal, 127 Pa. St. 10, 17 Atl. 682, a man gave a note of five thousand dollars to a trustee for his children named therein, due five years after death, with interest. It was sought to enforce the note after his death, and the transaction was sustained as an executory gift inter vivos. That is clearly in conflict with Conrad v. Manning's Estate, 125 Mich. 77, 83 N. W. 1038, unless it can be distinguished on the ground that in the Ross case the payee was a trustee. Conover's Admr. v. Brown's Exrs., 49 N. J. Eq. 156, 23 Atl. 507, is in direct conflict with Conrad v. Manning's Estate, 125 Mich. 77, 83 N. W. 1038.

If claimant had no promise which she could specifically enforce against her father, or upon which she could base a claim for damages, it follows that she is not entitled to subrogation as against her father or his estate. A void promise cannot be made the basis of subrogation against an unwilling promisor. The same reason that is a bar to the one claim is also a bar to the other. However commendable was the promise of Mr. Fischer to give a larger share of his property to his unfortunate daughter than to his other children, it was a promise absolutely null and void until it became merged in his voluntary execution of it. His promise to pay was for some unknown reason left unexecuted. She paid no valuable consideration for the promise, and cannot, therefore, enforce it. It is, however, urged that Mr. Fischer's primary liability to pay the debt was unaffected by the deed of gift, and, as the subject of the gift has paid the debt, therefore claimant is entitled

to subrogation. This claim cannot be maintained upon any other theory than that there was a valid gift of the entire land free from all encumbrances. If the promise [618] made by Mr. Fischer to his daughter to pay those encumbrances had been omitted from the deed, clearly he would have been under no obligation as to her to pay them, although the mortgagee could enforce his (Fischer's) primary liability. In such case the gift would have been only that of the equity of redemption. She would not in that event, by paying the mortgage, have been in position to recover the amount from her father or from his estate, for she would have taken title subject to the mortgage.

It is urged that "the father is already obligated to pay the debt [the debt secured by the mortgage], so that the question is not whether he may agree to pay it, but it is whether he may make a gift of his property without affecting this already existing agreement to pay it." If this logic is sound, it must, in my judgment, follow that every grantee who buys land subject to a mortgage can buy up the note evidencing the debt and sue the mortgagor therefor. This, evidently, is not the law. When a grantee purchases subject to a mortgage which is expressly exempted from his covenant of warranty, his undertaking with his grantor is to pay the mortgage if he desires to save his land. The amount of the mortgage is deducted from the purchase price. When such grantee pays the mortgage, he pays only what he, as against his grantor, has assumed to pay. One by a deed of gift certainly can acquire no more than one acquires by deed of purchase. The conveyance subject to the mortgage entails upon both grantees the same obligation to pay the mortgage, so far as the grantor is concerned. No arrangement between the grantee and the grantor can, of course, change the liability of the grantor and mortgagor to the mortgagee. His already "existing agreement" remains the same in either case, and is always unaffected by any subsequent transfers of the land. But where he sells and conveys land by deed, subject to a mortgage, the primary obligation to pay the mortgage, as between the grantor and grantee, rests upon the grantee. If the mortgagee abandons his security and sues upon the note or obligation to which the [619] mortgage is collateral, and by his suit compels payment, such grantor (the mortgagor) is clearly entitled to recover from his grantee the amount thereof, and should be subrogated to the rights of the mortgagee

against the land. Our attention has been called to no case where a mortgagee has pursued so extraordinary a course. The universal course in such cases has been to foreclose the mortgage, sell the land, and obtain a personal decree against the mortgagor for the defficiency.

If Mr. Fischer had voluntarily paid the mortgages, he would then simply have carried out his nonenforceable contract and have completed his gift, as, perhaps, he then intended to do. For some reason, perhaps a good one, he chose not to pay them. A void promise is no more effective than no promise, and the void promise in the deed had no more effect than if it had been omitted therefrom. If it is void for one purpose, it is void for all, and cannot be made available, either directly or indirectly. Only performance of the promise can be of any avail to the claimant.

A gift of personalty can be consummated only by an unconditional delivery of the thing. A gift of realty can be consummated only by the execution and delivery of a deed. If either is encumbered, the donor gives only what he had to give. He cannot give the interest of a third party in the property. However clear may be the intention of the donor to pay the encumbrances and thus give the entire property, he can accomplish this only by actually paying them. Neither his promise without a valuable consideration, nor his intention as evidenced by such promise, is of any avail to the donee.

Other interesting questions are raised, but they become immaterial in view of the conclusion we have reached.

Judgment is reversed, and new trial ordered.

The other justices concurred.

There Must be a Consideration to support every promise, whether evidenced by writing or not: Stewart v. Jerome, 71 Mich. 201, 15 Am. St. Rep. 252; Neal v. Coburn, 92 Me. 139, 69 Am. St. Rep. 495; Davis v. Morgan, 117 Ga. 504, 97 Am. St. Rep. 171.

A Conveyance in Consideration of love and affection is valid as between the parties: McKee v. West, 141 Ala. 531, 109 Am. St. Rep. 54. As to whether a deed is one of gift or purchase, see Brown v. Whaley, 58 Ohio St. 654, 65 Am. St. Rep. 793, and note.

VAN DEN BOSCH v. BOUWMAN.

[138 Mich. 624, 101 N. W. 832.]

CONDITIONAL SALE—Resale by Vendor—Deficiency Judgment.—If a note given for the purchase price of chattels provides that the title shall not pass until the note is paid in full, and that the payee may, at any time, when he deems himself insecure, whether before or after the maturity of the note, take possession of the property and sell it, or retain it and consider the amount paid as compensation for wear and tear, the payee is entitled, in case he retakes the property and sells it for less than the amount remaining due, to sue the maker and recover such balance. (p. 337.)

Leonard Y. Devries and Diekema & Kollen, for the appellant.

Sooy & Heck, for the appellee.

624 MONTGOMERY, J. Defendant, on receiving of plaintiff possession of the property described therein, executed and delivered to plaintiff the following note:

"$160.00.

"Noordeloos, Ottawa Co., Mich., May 27, 1901.

"After date I promise to pay to Peter Van Den Bosch, or bearer, One Hundred Sixty Dollars, payable at the residence of Peter Van Den Bosch, Noordeloos, Mich., for value received, by monthly payments of $10.00 per month or more; said first payment to be made June 10th, A. D. 1901.

625 "The express condition of the sale and purchase of a sorrel horse, harness, and top buggy, for which this note is given, is such that the title, ownership, or possession does not pass from the said payee until this note and interest is paid in full and that the said payee has full power to declare this note due and take possession of said above-described property at any time he may deem himself insecure, even before the maturity of the note, and upon taking possession, either before or after the maturity of the note, said payee may sell the same either at public or private sale, without notice; or said payee may retain the same without sale, and in such case the amounts paid on this note shall be deemed to be compensation only for the use, wear and tear of said property.

(Signed) "TOM BOUWMAN."

After certain payments had been made, plaintiff took possession of the property, sold the same for a sum less than the

amount remaining due, sued for the balance, and recovered. From this judgment defendant brings error.

The contention is that this was a conditional sale, and that, on the plaintiff reclaiming the property, the consideration for the defendant's engagement to pay ceased, and that under the holding in Perkins v. Grobben, 116 Mich. 172, 72 Am. St. Rep. 512, 74 N. W. 469, 39 L. R. A. 815, and McBryan v. Universal Elevator Co., 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683, the vendor is not entitled to recover the contract price. The question is, What does the contract fairly import? Courts have no right to refine definitions in a manner to override the expressed intent of the parties. This contract gave the seller two options: 1. He could retake the property and treat the amount paid as payment for its use and "wear and tear"; 2. He was authorized to seize and sell the same at public or private sale. He chose the latter. The question is upon whose account that sale was made under the terms of this contract. The purpose of the sale provided for by the contract is plain. It is to satisfy, so far as the amount realized will do so, the amount remaining unpaid. Can it be said that the intention of the parties as expressed was that whatever remained due should be paid by the maker of this note? We think this question should be answered in the affirmative. There is an [626] express promise to pay, and it is not abrogated nor satisfied by authority given to sell and apply the proceeds of the sale in part payment. There is no reason why contracts of this nature should not be construed and enforced according to the plainly expressed purpose of the parties: Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270; Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277.

The judgment is affirmed.

The other justices concurred.

Conditional Sales are discussed in the monographic notes to Fleet v. Hertz, 94 Am. St. Rep. 234-258; Andrews v. Colorado Sav. Bank, 46 Am. St. Rep. 295; Palmer v. Howard, 1 Am. St. Rep. 63. That such sales are valid, see the recent case of Freed Furniture Co. v. Sorensen, 28 Utah, 419, 107 Am. St. Rep. 731.

A. L. LAKEY COMPANY v. KALAMAZOO.

[138 Mich. 644. 101 N. W. 841.]

MUNICIPAL CORPORATION—Obstruction of Stream—Liability for Overflow.—Where a harrow spring company builds a warehouse in a city across a creek on land owned by it, and the harrow teeth therein stored fall through the floor and catch drift material in a manner not open to the observation of municipal employés cleaning out the creek as a health measure, and this obstruction in conjunction with heavy rains causes an overflow of the stream flooding private property, the city is not liable for the obstruction. (p. 341.)

MUNICIPAL CORPORATIONS—Obstruction of Stream—Liability for Overflow.—Where a city drains surface water into a creek flowing through it, and accumulations of mud and sand in the bottom of the stream are thereby occasioned, it is not liable for such obstruction when, during heavy rains, the stream overflows to the injury of private property. (pp. 342, 343.)

Harry C. Howard and William R. Fox, for the appellant.

Osborn & Mills, for the appellee.

645 GRANT, J. The appellant's statement of the case is not disputed, and we therefore adopt it. It is as follows:

This is an action for permitting Arcadia creek to overflow its banks and flood the plaintiff's cellar. Plaintiff had verdict and judgment for seventeen hundred and sixty dollars. Arcadia creek is a natural watercourse, draining a portion of the area of the defendant city. The city is situated in a valley. The creek has always carried off the rainfall within its natural area, and, as the community grew, streets were paved and laid out across the creek, and the gutters from the streets were connected with it. Later, as the city grew, underground waterways known as "storm sewers" were installed (which served substantially the same purpose as the old gutters) which were also connected with the creek, but no sewer or gutter connected with it drained any area except the natural watershed. The creek passes through a thickly settled business portion of the defendant city, and substantially all the large buildings of the city are within the drainage area of the creek. The territory occupied by these buildings has been gradually built up, and the water which falls upon the roofs of the buildings collects and is discharged in some instances into the sewers, but usually on the pavements, from whence by gutter or storm sewer it finds its way into the creek. On June 18 and July 2, 1902, heavy rains fell within the drain-

age area, and the creek overflowed its banks at or near the plaintiff's place of business, and the water ran into its cellar, whereby it claims damage.

The city, although it has never admitted that it was bound so to do, has, as a health measure, always cleaned the watercourses within the city, and very shortly before the 18th of June, 1902, the creek was thoroughly cleaned by the city employés, with the one exception that at the 646 building occupied by the Harrow Spring Company, which faces on Edwards street in said city, and which is but a few rods from plaintiff's place of business, the workmen were unable to reach the bed of the creek, because for a considerable distance there were private storage sheds built entirely over it. The sheds had been over the creek for a number of years, and entirely upon private property, and there was no method of cleaning it at this place unless the floor of the sheds was removed. Upon inspection, the city employés discovered that there were stored within the sheds harrow teeth and other iron material, and in such a manner that it was impossible for them to reach the bed of the creek. After the floods the Harrow Spring Company moved from their place of business, and then the floor of these sheds was taken up, and it was discovered that harrow teeth had fallen through the floor into the creek in such a manner as to catch debris and drift material, making a dam, which undoubtedly to some extent caused the flood.

The court instructed the jury that the city had the legal right to turn the surface waters of this watershed of the creek into the creek, and that it had turned no more of the surface water into it than it was justified in so doing. The court also instructed the jury that if they found that the city permitted the creek "to become and be so obstructed on the days in question, and that the obstruction caused the creek to overflow its banks and damage the plaintiff's property, then the plaintiff would be entitled to recover; provided you further find that the rain storms which happened on those days were such as might ordinarily have been expected to occur in this latitude, although happening at rare intervals." He further instructed them if the rainfall was unprecedented, and would have caused the creek to overflow notwithstanding the obstructions, then the defendant was not liable. He also instructed them that it was the duty of the city to keep the creek reasonably clear and free from obstructions, and that

it was responsible for the obstructions by the Harrow Spring Company.

[647] The overflow of the creek so as to flood the basement of plaintiff's building was caused either by a great rainfall, or by the obstruction of the Harrow Spring Company, or both combined. Of course, but for the heavy rains the overflow would not have occurred. It is very probable that but for the obstruction the water would have remained within the banks of the creek. The evidence is that no such flooding had before been known. Plaintiff's manager testified that it had occupied the building ever since it was built; that it had never had a flood to that extent before; that only once before had the water reached its basement, and that was about two years previous; that that overflow was caused by a blockade in the bed of the creek by a firm named Bush & Patterson, who were building a mill, and had lumber and brick piled across the creek. After the first flood plaintiff took no steps to remove its material from its basement, because, as its manager testified, "they did not think they would have another flood right on the heels of the first. We never had any damage before; it had never been flooded before; and, basing my judgment upon the line of my former experience, I certainly did not think it would happen so soon again."

The rule is conceded to be that a municipality is not responsible for damages caused by unexpected and unusual rainfalls, but only for those which experience has shown are liable to occur: City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Seaman v. City of Marshall, 116 Mich. 327, 74 N. W. 484.

It is not claimed by the defendant in the court below, and is not now claimed, that the court erred in leaving to the jury the question whether the rainfall was unprecedented, or one which might have been expected to occur, although happening at rare intervals.

[648] Two questions are raised: 1. Was the defendant liable for the obstruction of the creek by the Harrow Spring Company? The defendant did not cause the obstruction. It was not aware of it until after that company had removed the contents of its warehouse, built over the creek, and the defendant had been able to reach the bed of the creek from the inside, the only way it appears by which it could be reached and cleaned. The Harrow Spring Company owned both banks and the bed of the stream. So long as it did not inter-

fere with the natural flow of the water, it had the right to erect buildings over it. The building itself did not interfere with the natural flow. The defendant had no control over the creek (except that inherent in municipal corporations under the police power) to cause it to be cleaned for the protection of the health of its inhabitants. Even under its charter it could only "regulate, improve, alter, widen or change the channel of Acadia brook, ... on making compensation to persons whose property may be taken for such purposes." The fact that it had caused the stream to be cleaned for sanitary reasons did not make it the duty of the city to protect owners of land from the overflow of water naturally emptying into it. The creek had not been appropriated by the city for the purpose of sewerage. It was no more liable in damages to reparian owners for water running into it, under the circumstances of this case, than it would be for emptying its surface water into the Kalamazoo river, where its general sewerage is conducted. The riparian owners along such streams are entitled to use them for any legitimate purpose so long as they do not affect the rights of other riparian owners or cause a nuisance dangerous to the health of the inhabitants: Knight v. Barr, 130 Mich. 673, 90 N. W. 849. It follows that the instruction of the court that the defendant is liable for the obstruction of the Harrow Spring Company is erroneous: Haynes v. Town of Burlington, 38 Vt. 350; Coonley v. City of Albany, 132 N. Y. 145, 30 N. E. 382.

649 2. Was the defendant liable for obstructions arising from the flow of water into the creek? While the instruction of the court is not very specific as to the character of the obstruction for which the defendant is liable, we infer from its general character, and from briefs of counsel, that it was held responsible for any obstructions caused by the accumulation of sand and mud in its bottom which the water from the streets and buildings washed into it, and that it was the duty of the city to keep the creek at its natural depth and width.

Arcadia creek is a natural watercourse. As the city grew, the watershed of the creek became covered with buildings. Parties who owned land on both sides of it erected buildings over it, as they had the legal right to do. Paved streets became necessary. The speedy discharge of the water from the buildings and streets into the creek was essential to the business, comfort, and health of the inhabitants of the city. The authorities are apparently unanimous in holding that under

such circumstances the city had the legal right to construct pavements and storm sewers to speedily carry off the water into the creek through which it was emptied into the river of Kalamazoo, a short distance away. In this process some dirt and material, necessarily deposited upon the pavements, would be carried into the creek. Some of this dirt and material would perhaps settle in the bottom of the creek and lodge along its banks.

The cities and villages in this country are usually situated along the banks of rivers and small streams, into which the water falling upon their paved streets and buildings must be conducted. For the dirt and material thus carried into such streams, the municipalities are not liable to the riparian owners, or to others living in the vicinity. If any such owner is damaged thereby, it is damnum absque injuria. Neither does the law impose upon the municipality the duty to keep the bed of the stream at its original depth and width. As a measure of health, the municipality undoubtedly has the power to clean or cause to be cleaned the bed of the stream and thus accelerate the flow [650] of the water, but the municipality has no other control over it. It owns no land along the banks. The creek is not a trunk sewer owned by the municipality.

Under the facts of this case the defendant is not liable. Its nonliability is founded in sound reason, and is supported by the authorities: Wilson v. City of Waterbury, 73 Conn. 416, 47 Atl. 687; Wheeler v. City of Worcester, 10 Allen, 591; Mayor etc. of Cumberland v. Willison, 50 Md. 138, 33 Am. Rep. 304; Fair v. City of Philadelphia, 88 Pa. St. 309, 32 Am. Rep. 455; Kavanagh v. City of Brooklyn, 38 Barb. 232; Gould on Waters, sec. 270.

The learned counsel for the plaintiff cite and rely upon Ashley v. City of Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Rice v. City of Flint, 67 Mich. 401, 34 N. W. 719; Seaman v. City of Marshall, 116 Mich. 327, 74 N. W. 484; Manning v. City of Lowell, 130 Mass. 21; Brayton v. City of Fall River, 113 Mass. 218, 18 Am. Rep. 470; O'Brien v. City of St. Paul, 18 Minn. 176, 1 Gil. 163; Clay v. City of St. Albans, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368; Noonan v. City of Albany, 79 N. Y. 470, 35 Am. Rep. 540; Barton v. City of Syracuse, 36 N. Y. 54; Stanchfield v. City of Newton, 142 Mass. 110, 7 N. E. 703; Parker v. Nashua, 59 N. H. 402; Mayor etc. of Waycross v. Houk, 113 Ga. 963, 39 S. E. 577.

In Ashley v. City of Port Huron, 35 Mich. 296, 24 Am. Rep. 552, the city cut a sewer in such a manner as to cause a collection of large quantities of water upon the plaintiff's land which would not otherwise have flowed there.

In Rice v. City of Flint, 67 Mich. 401, 34 N. W. 719, the city made a dam by raising the grade of the street, so that the water overflowed the plaintiff's premises.

In Seaman v. City of Marshall, 116 Mich. 327, 74 N. W. 484, the city was held negligent in not providing reasonably efficient means to carry off the water which should reasonably have been expected to accumulate.

In Manning v. City of Lowell, 130 Mass. 21, the territory which was drained of its surface water was very much greater than the extent of territory which would be thus naturally drained without the intervention of the artificial means [651] constructed by the city. In other words, the city took water which would not naturally flow upon defendant's land, and discharged it upon his land.

In Brayton v. City of Fall River, 113 Mass. 218, 18 Am. Rep. 470, the city drained by its system of sewers a territory of sixty or seventy-five acres, and emptied it into a creek, whereas only about fifteen to twenty acres naturally drained into it.

In O'Brien v. City of St. Paul, 18 Minn. 176 (Gil. 163), the area of the drainage through the sewer is not clearly shown. It is stated that by means of the sewer the city conducted to and emptied upon the plaintiff's premises a greater body of water than the natural flow of water through the watercourse —wore away the banks and soil to a much greater extent than would have been caused by any stream naturally flowing through said watercourse. If it is meant by this that a municipality cannot pave its streets and construct storm sewers so as to convey water more rapidly into the creek than it would naturally flow, it is against the clear weight of authority, and against the instruction of the court in this case.

In Clay v. City of St. Albans, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368, we gather from the statement of the case that the city, by its gutters and drains, collected surface water and cast it in a body onto plaintiff's land. It is not a case of draining into a creek or natural watercourse.

In Noonan v. City of Albany, 79 N. Y. 470, 35 Am. Rep. 540, the water was collected from the lands and streets of a municipality into an artificial channel and discharged upon

plaintiff's lands. The defendant in that case, by means of sewers and manner of grading, concentrated the surface water and sewage of a large territory and discharged it in one body into a ravine where a small rivulet formerly ran.

Barton v. City of Syracuse, 36 N. Y. 54, involves the duty of the municipality to keep its sewers in proper repair and prevent their becoming filled with dirt and rubbish, thus impeding the overflow of the water, and causing it to set back upon the lands of lot owners. Stanchfield v. City of Newton, 142 Mass. 110, 7 N. E. 703, is a similar case.

652 In Mayor etc. of Waycross v. Houk, 113 Ga. 963, 39 S. E. 577, the plaintiff sought to enjoin defendant from continuing or from extending a main sewer so that the sewage would be discharged directly upon her land. The basis of the decree in that case was that the nuisance should be abated as dangerous to life and health.

In Parker v. Nashua, 59 N. H. 402, the liability was based upon the negligent management of the municipality in not keeping a culvert free from obstructions.

We are of the opinion that those cases do not apply to this one.

Judgment reversed, and new trial ordered.

The other justices concurred.

The Right to Drain Surface Water into a natural watercourse is generally conceded, notwithstanding the volume of the stream is thereby increased to the injury of riparian proprietors: See the monographic note to Mezell v. McGowan, 85 Am. St. Rep. 733; Baldwin v. Ohio Township, 70 Kan. 102, 109 Am. St. Rep. 414. However, the accumulation in one channel of a large stream of water by the act of a city places the duty upon it to see that suitable provision is made for its escape without injury to private property: Kelly v. Pittsburgh etc. R. R. Co., 28 Ind. App. 457, 91 Am. St. Rep. 134.

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

CITY OF MOORHEAD v. MURPHY.

[94 Minn. 123, 102 N. W. 219.]

MUNICIPAL CORPORATIONS—Reimbursement of Officer for Legal Expenses.—A municipality has common-law power to reimburse a police officer for expenses and attorney fees incurred in the defense of an action for false imprisonment, if the officer was acting in good faith in the exercise of his duties. (p. 348.)

W. R. Tillotson and F. H. Peterson, for the appellant.

J. M. Witherow, for the respondent.

124 LEWIS, J. Plaintiff city is a municipal corporation, and defendant was the duly appointed, qualified and acting chief of police for 1901 and 1902. February 20, 1902, defendant effected the arrest of one Allen Blood for a violation of a city ordinance. The following April 11th Blood commenced an action in the United States court against defendant to recover damages for false arrest and imprisonment. The cause was tried at the June, 1902, term of the United States district court at Fargo, North Dakota, and defendant employed certain attorneys to represent and defend him at such trial. The city attorney of plaintiff corporation also appeared, by virtue of his office, and assisted in the defense. August 1st thereafter, the attorneys so employed rendered to defendant a bill for three hundred dollars for their services, which, together with a bill for disbursements necessarily incurred in the conduct of litigation, amounting to ninety dollars, he presented to plaintiff city, and on the following December 8th the common council duly allowed and paid the bill, and the money received by defendant was used by him in paying the attorney's fees and in reimbursing himself. After the bill was allowed and paid by the city, and within

the time allowed by law, upon the request of seven taxpayers, the city attorney appealed from the decision of the council allowing the bill. The appeal having been perfected, defendant here served his complaint, which stated the facts substantially as above set forth. The complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against plaintiff, and the demurrer was sustained.

The question presented upon this appeal is whether, under the facts disclosed, the council had authority to pay the bill for disbursements and attorney's fees incurred in defending its chief of police in an action brought against him to recover damages for false imprisonment while in the exercise, in good faith, of his official duties.

[125] The general welfare, good order, protection and safety of the people of the city are among the specific duties imposed upon the common council to accomplish by appropriate legislation. In furtherance of this authority, city ordinances were passed for the prevention of crime, and it is made the duty of the chief of police to serve and execute warrants issued out of any justice court of the city, and to pursue and arrest any person charged with or who has committed any violation of any city ordinance; and is constituted one of the conservators of the peace, with authority to command the peace, and a summary manner suppress all riotous and disorderly proceedings. Unless expressly prohibited, the municipality possessed the general powers of a municipality at common law, and under the common law it was authorized to secure special legal assistance: Horn v. City of St. Paul, 80 Minn. 369, 83 N. W. 388.

We have been unable to discover any provisions in the city charter which either expressly or by implication are in conflict with the common-law power to employ such legal assistance. It is made the duty of the county attorney, when directed by the council, to appear and conduct the defense in any action against any officer or employé of the city on account of any act done by him in the performance of his official duties, but the common council is not limited to the services of such attorney. Sections 136 and 137 of the charter are provisions with reference to the letting of contracts to the lowest responsible bidder, and have no reference to and are not limitations upon the common council in regard to the subject here under consideration.

The law upon this question is well defined in Sherman v. Carr, 8 R. I. 431. In that case the mayor of the city was sued upon a charge of false imprisonment, and he made defense upon the ground that the acts complained of were committed by him in his capacity as mayor. A verdict having been recovered against the mayor, the common council made an appropriation to reimburse him, and a suit was brought by a taxpayer to enjoin the payment of the same. The question before the court is stated thus: "Whether it is in the power of the city council to indemnify one of the officers of said city, who, performing the duties of his office in good faith, has exceeded the powers of that office, and thereby incurred damages at law?" The city charter prohibited officers of the municipality from doing or transacting any matters except [126] such as belonged to the legitimate duties of a municipal body within it own province, or to vote money for any object for the regular, ordinary and usual expenses of the city. The court held that it was one of the ordinary expenses of the city to protect its officers who in good faith exercised the functions of the office.

The court reasoned that it was in the interest of good government, and for the benefit of the city, that such power to indemnify should be exercised; that to hold an officer entirely responsible for his acts while in the performance of his official duties would naturally tend to make him overcautious, if not timid, to the detriment of the public service. On the other hand, if such officer had the right to fall back upon the treasury of the city, there would be danger of his becoming reckless and overbearing in the exercise of the powers of his office. The court said: "It would seem, therefore, to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city, that, on the one hand, they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and, on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution."

Another interesting case is that of Cullen v. Town of Carthage, 103 Ind. 196, 53 Am. Rep. 504, 2 N. E. 571, where the marshal of the town arrested a person for an assault upon a peaceable citizen, and was sued for false imprisonment. The board of town trustees employed attorneys to defend the mar-

shal in that action, which they successfully did. The town having refused to pay for the services, the attorneys brought an action to recover the same, and the defense was that the employment of the attorneys by the board of trustees was ultra vires. The court held that the town was bound by its contract, placing its decision upon the ground that one of the essential things in the enforcement of the laws is that the people shall have that respect for the constituted authorities that arises out of a common understanding that the laws will be rigidly executed—following the reasoning of the Rhode Island case.

Other cases bearing upon this subject are Fuller v. Inhabitants, 11 Gray, 340; Bancroft v. Inhabitants, 18 Pick. 566, 29 Am. Dec. 614; State v. Council, 38 N. J. L. 430, 20 Am. Rep. 404; Pike v. Middleton, 12 N. H. 278. Mr. Dillon, in the [127] fourth edition of his work on Municipal Corporations (section 147), states the rule thus: "Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, ... it cannot assume the defense of the suit, or appropriate its money to pay the judgment therein. But such a corporation has power to indemnify its officers against liability which they may incur in the bona fide discharge of their duties, although the result may show that the officers have exceeded their legal authority." The authorities on this subject are collected under note 6, page 1160, of 20 American & English Encyclopedia of Law, second edition.

According to the facts stated in the complaint, the officer was acting in good faith in the discharge of his duties. Under the authorities above cited, not being prohibited by the charter, the city council had, in the first instance, authority to employ the attorneys, and enter into a contract with them for their compensation. Having such power, they could afterward ratify that which they were originally authorized to do; and, when the bill for such services was presented to the common council, so far as appears from the facts set forth in the complaint, their action in allowing the bill must be treated as an intention to approve of their conduct, and accept the same for the benefit of the city.

It is not to be understood that what has been said is in conflict with the right of the taxpayers to have the proceedings reviewed upon appeal in the district court. We have merely determined the legal question that, as a matter of law, the

city council had authority originally to make a contract with the attorneys for their compensation, and that, upon the facts stated in the complaint, their action in allowing the bill will be deemed to be an expression of approval and reimbursement.

Order reversed.

The Trustees of a Town have implied power to employ counsel to defend the marshal against an action of false imprisonment brought by one arrested by him for violation of an ordinance: Cullen v. Carthage, 103 Ind. 196, 53 Am. Rep. 504.

MONTGOMERY v. LEUWER.

[94 Minn. 133, 102 N. W. 367.]

PAYMENT—Burden of Proof.—If, under the terms of a written obligation, a specific sum of money becomes due and payable at a certain time, the production of such obligation establishes prima facie that the amount therein stipulated to be paid is due, and it is not incumbent on the person holding such obligation, in the first instance, to show either that demand has been made, or that there has been a failure to comply therewith. (p. 350.)

F. C. Irwin, for the appellants.

O. H. O'Neill, for the respondent.

133 LOVELY, J. This action was brought to recover rent claimed to be due on a frame building in the village of Belle Plaine, leased to the defendants for one year at the annual rental of two hundred and sixteen dollars, payable in quarterly installments of fifty-four dollars in advance. The complaint alleges the execution of a written lease in accordance with the terms above stated; also that defendant took possession thereunder; that plaintiff had performed the conditions thereof, but defendants had failed to pay the rent of the two last quarters of the year which had expired at the time the action was commenced. Defendant Leuwer answered, denying the allegations of the complaint and setting forth affirmative matter to show that the premises became uninhabitable, with specific averments of their character in that respect. Defendants Witt and Affolter denied the execution of the lease, or that they were indebted to the plaintiff in any sum.

The action was, by agreement, submitted to a referee to try and determine the same. On the trial of the cause, when reached before the referee, the plaintiff introduced the contract of lease, which sustained the allegations of the complaint, and then rested, without proof of demand [134] or any default in the payment of the rental due from the defendants, or either of them, whereupon defendants moved to dismiss the action, which motion was denied; and afterward, upon hearing in the district court, judgment was ordered in favor of the plaintiff for the amount demanded in the complaint. This appeal is from an order denying a motion to set aside the report of the referee, and refusing a new trial.

The execution of the lease set out in the complaint was established at the time it was offered in evidence; hence it would follow that the defendants would be liable for the whole amount of the rent to accrue under such lease, unless it has been paid, or plaintiff would be required to prove a demand or nonpayment, but this was affirmative matter of defense to be shown by defendants, and the burden to prove the same rested upon them. Where, under the terms of a written obligation, a specific sum of money becomes due and payable at a certain time, the production of such obligation establishes prima facie that the amount therein stipulated to be paid is due, and it is not incumbent on the person holding such obligation in the first instance to show either that demand has been made, or that there has been a failure to comply therewith. We think this is too firmly established on authority, as a question of pleading and proof, to now admit of any doubt: 9 Am. & Eng. Ency. of Law, 2d ed., 199; Romer v. Conter, 53 Minn. 171, 54 N. W. 1052; First Nat. Bank of Shakopee v. Strait, 71 Minn. 69, 73 N. W. 645; Marshall & Ilsley Bank v. Child, 76 Minn. 173, 78 N. W. 1048.

It is practically conceded by defendants that this rule would apply, had the plaintiff claimed the whole amount due, but, having demanded only a part, a different rule should prevail. Upon a question of the construction of pleadings, and the inference that follows therefrom, it may be regarded as a legal as well as a mathematical rule in such cases that the greater includes the less; and if the production of the lease was sufficient to show prima facie that the whole amount of rent was due, it would seem to be reasonable to conclude that the defendants had no right to complain.

Order affirmed.

The Plea of Payment is an affirmative plea, and the burden of proof is on the party who pleads it: Sampson v. Fox, 109 Ala. 662, 55 Am. St. Rep. 950. See, also, Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258; First Nat. Bank v. Hellyer, 53 Kan. 695, 42 Am. St. Rep. 316.

KELLY v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

[94 Minn. 141, 102 N. W. 380.]

INSURANCE—Arbitration Clause.—If arbitration is provided for by an insurance policy, in case the parties are unable to agree as to the amount of loss, the arbitration provided for is not a condition precedent to the right of action upon the policy unless the parties actually disagree as to the amount of the loss, and it is unnecessary, in the absence of such disagreement, to allege in the complaint in an action upon the policy that arbitration was, or was not had, or that it was waived by the insurer. (pp. 352, 353.)

M. H. Boutelle, for the appellant.

H. Richardson, for the respondent.

143 BROWN, J. Action to reform and recover upon a policy of fire insurance. Defendant interposed a general demurrer to the complaint, which was overruled by the trial court, and this appeal was taken.

The complaint sets out that on April 9, 1903, the defendant issued to one C. H. Grafenstadt a certain policy of fire insurance, for the sum of 144 fifteen hundred dollars, upon his stock of goods and merchandise, consisting of dry goods, groceries, boots and shoes, etc.; that on October 11, 1903, the property, which is alleged to have been worth the sum of fourteen thousand dollars, was totally destroyed by fire; that thereafter, on October 13th, Grafenstadt assigned the policy of insurance to the plaintiffs in this action, who are now the owners thereof. It further alleges that, by the contract entered into at the time the policy was issued, it was understood and agreed between the parties that Grafenstadt might place other insurance upon the same property, and that, by the mutual mistake of the parties, this understanding was not incorporated in the written policy. The relief demanded is that the policy be reformed and corrected, and made to conform to the agreement made at the time the contract was entered into, and that plaintiffs recover thereon the sum of fifteen hundred dollars, with interest—the amount of loss suffered.

It is urged by defendant that the complaint fails to state a cause of action, for two reasons: 1. That it does not allege that an arbitration between the parties has ever been had respecting the amount of the loss, as provided by the policy, or that an arbitration was waived by defendant; and 2. That it states no facts showing a necessity for a reformation of the policy.

1. The complaint states but one cause of action, and that to recover upon the policy, but, to entitle them to so recover, they seek to have the policy corrected and made to conform to the contract actually entered into between the parties. While it is true that the complaint discloses no particular necessity for correcting the policy, it might become necessary that it be reformed, depending upon the defense interposed by defendant. The policy, as written, provides that it shall be void if the insured had at the time it was issued, or should at any time thereafter procure, any other contract of insurance upon the same property without the consent of the company. The property covered by the policy is alleged to have been of the value of fourteen thousand dollars, and it is fair to assume that the owner did procure other insurance thereon. If the policy should not be corrected and made to conform to the contract actually entered into, the defense that other insurance was subsequently placed on the same property would be fatal to plaintiffs' right to recovery. No objection occurs to us why they may not anticipate that defense. Of course, if it is not made, there would be no occasion [145] for the reformation or correction of the policy, and the court would not permit a waste of its time by a trial of the question.

2. The policy provides that: "In case of loss, except of total loss on buildings, under the policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons, to be named by the other, and the third being selected by the two so chosen."

It is insisted by appellant that an arbitration of the amount of the loss is a condition precedent to the right of action on the policy, and that the complaint is defective, in that it contains no allegations showing that an arbitration was had, or that it was waived by defendant.

We do not concur in this contention. The question whether this condition of the policy renders an arbitration in case of

loss a condition precedent to the right of recovery has been before the court in several actions, and by the later decisions it has been held that the provision for arbitration is not a condition precedent unless a controversy in fact exists between the parties as to the amount of the loss. In the case of Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252, and also in Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932, it was, in substance, said that the provision of the policy referred to was a condition precedent to the right of action thereon. But in both those cases it affirmatively appeared that a controversy in fact existed between the parties as to the amount of the loss. In the case of Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647, it was held that the arbitration provided for by the terms of the policy is not a condition precedent to the right of action upon the policy unless the parties actually disagree as to the amount of the loss. Until there is some controversy between them on that subject, there is no occasion for arbitration—there is nothing to arbitrate. The same was, in effect, also held in Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212.

The question in the case at bar is one of pleading, and our attention has not been called to any case in this court directly bearing upon it. We think it should be answered adversely to defendant's contention. The right of arbitration provided for by the terms of the policy was [146] intended for the benefit of both parties, and either may insist upon it if a dispute exists between them as to the amount of the loss. If there is in fact a controversy on that subject, and an arbitration is not had or waived by the insurance company, no recovery upon the policy can be had by the insured. Prima facie, however, the insured is entitled to recover the face value of his policy, and he may frame his complaint accordingly. If a controversy in fact exists as to the amount of the loss, the company may plead in its answer the failure to arbitrate the question, and thus defeat the action. The question whether a pleading should cover this particular feature in a case of this kind was presented in Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885, where it was held that it was unnecessary that the plaintiff expressly allege that an arbitration was or was not had, or was waived: See, also, Kahnweiler v. Phenix Ins. Co., 14 C. C. A. 485, 67 Fed. 483.

Order affirmed.

Arbitration as a condition precedent to the right to bring an action on an insurance policy is discussed in the recent case of Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 105 Am. St. Rep. 218, and cases cited in the cross-reference note thereto. In Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 103 Am. St. Rep. 725, an agreement for arbitration in a policy is declared unenforceable, as tending to oust the courts of jurisdiction.

MINNESOTA DEBENTURE COMPANY v. JOHNSON.

[94 Minn. 150, 102 N. W. 381.]

EJECTMENT—Burden of Proof.—In ejectment, plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant, and the burden of proof is upon the plaintiff to establish his title. (p. 356.)

JUDGMENTS are Conclusive only against parties thereto and their privies. As to strangers, they are evidence only of their entry. (p. 356.)

JUDGMENTS—Privies.—To constitute one the privy by estate to a party to a judgment, it must appear that he succeeded after the bringing of the action by which he is sought to be concluded to an estate of interest held by such party. (p. 356.)

JUDGMENTS as Evidence.—The rule that a judgment is admissible in evidence against all the world, as a link in a party's chain of title does not apply to all judgments. It applies more particularly to judgments in partition proceedings, probate decrees, actions to foreclose mortgages or liens, and to all judgments rendered in actions, the object of which is to acquire title held by the adverse party. (p. 357.)

JUDGMENTS are Admissible in Evidence as a link in the chain of title only where they transfer title or render valid a particular link which, without the judgment, would be defective or invalid. (p. 357.)

JUDGMENTS as Evidence.—The rule that a judgment is admissible in evidence against all the world as a link in a party's chain of title does not apply to ordinary judgments in actions to determine adverse claims, which do not purport to transfer title, or render valid an otherwise defective link in the chain of title. (pp. 357, 358.)

JUDGMENTS as Evidence.—An ordinary judgment, in an action to determine adverse claims to land, obtained by a total stranger to the title against a person appearing of record to be the owner, but who in fact was not, does not operate to transfer the title or constitute a link in the chain of title, nor is it admissible as such against the true owner, who was not a party to nor bound by such judgment. (p. 358.)

EJECTMENT.—Possession Alone is sufficient to maintain an action to determine adverse claims to land, and is available as a defense in an action of ejectment against a plaintiff, who produces no competent evidence of title against the person so in possession. (p. 360.)

Savage & Purdy, for the appellant.

Tryon & Booth, for the respondent.

[151] BROWN, J. Action in ejectment. The facts are as follows: To sustain the allegations of the complaint that plaintiff was the owner of the land in controversy, and entitled to its possession, plaintiff offered in evidence the record of a patent from the United States to one Moffett; the record of a deed from Moffett and wife to one Joseph Dean; the final decree of distribution of the probate court of Hennepin county in the matter of the estate of Joseph Dean, deceased, assigning and decreeing the property to William E. Dean and other heirs; the record of a deed from the heirs of Joseph Dean to George F. Dean; and a judgment in an action brought by this plaintiff against George F. Dean and others, entered on February 4, 1899—and rested its case. Whereupon defendant offered to prove that he was in the actual possession and occupancy of the property in question at the time of the commencement of the action in which the judgment just referred to was rendered, and has since that time continuously remained in the possession of the same. The offer was objected to by plaintiff, and the objection sustained by the trial court, unless defendant would disclose the nature of the title held by him. Defendant declined to include in his offer anything further than to show his actual possession of the land at the time of the commencement of the action referred to, and during its pendency, whereupon defendant rested his case, and the court instructed the jury to return a verdict for plaintiff. Defendant subsequently moved for a new trial, which the court denied, and he appealed.

The merits of the controversy respecting the title to the land are not now before the court. The question presented narrows down to whether plaintiff, by its evidence, made a case for recovery against defendant. The contention of plaintiff is that the judgment in the action [152] against Dean established at least a prima facie title superior to the rights arising in defendant's favor from his possession of the land, while defendant insists that the Dean judgment is not evidence against him of any right or title in plaintiff, and that his actual possession at the time the judgment was rendered, and continuous occupancy since, are superior to any title shown to be in plaintiff. We think defendant's contention is techni-

cally correct, and that the trial court erred in excluding the offer to show his possession.

The action is one in ejectment, and plaintiff must recover, if at all, upon the strength of its own title, and not upon the weakness of that of defendant. The burden of proof in such actions is upon plaintiff, and defendant may "fold his arms and await the establishment of the plaintiff's title": 10 Am. & Eng. Ency. of Law, 2d ed., 532. If plaintiff fails in his proof of title, he cannot recover, however weak or defective defendant's title may be. Plaintiff's title in the case at bar is founded wholly upon the judgment against Dean. It does not exhibit any independent title, nor any right nor interest which the judgment converted into a title. It is clear that the judgment, unless it operated to transfer the Dean title to plaintiff, or is a link in the chain of title, is not evidence against defendant. The judgment was rendered in an action against Dean and others to determine adverse claims to the land, the complaint in which alleged that plaintiff was the owner of the property, and that defendant Dean and others claimed some right, title, or interest therein, and that such claim was wholly void and without foundation. While the action was brought against Dean and "all unknown parties claiming an interest in the land," the judgment rendered by the court was limited to the rights of defendants expressly named therein. It did not purport to adjudicate the rights of any unknown parties, and defendant was not bound thereby as an unknown party. It is elementary that a judgment is conclusive only against the parties thereto and their privies. As to strangers, it is evidence only of its entry, and not of any fact on which it was based: Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Harper v. East Side Syndicate, 40 Minn. 381, 42 N. W. 86; Hartman v. Weiland, 36 Minn. 223, 30 N. W. 815; County of Olmsted v. Barber, 31 Minn. 256, 17 N. W. 473, 944. Defendant was not a party to that action, is not bound by it as such, and it does not appear that he holds possession of the land as a privy of [153] Dean. To constitute one the privy of another in cases of this kind, it must appear that he succeeded, subsequent to the bringing of the action by which he is sought to be concluded, to an estate or interest held by the party to the judgment: 24 Am. & Eng. Ency. of Law, 2d ed., 746. In order that the judgment may be evidence against defendant as a privy of Dean, it must appear, therefore, that after the commencement of that action

he succeeded to the title of Dean, or holds possession under or through him: Carroll v. Goldschmidt, 83 Fed. 508, 27 C. C. A. 566; Blew v. Ritz, 82 Minn. 530, 85 N. W. 548. This does not appear, and, if it was a fact, the burden was upon plaintiff to show it.

But it is urged by plaintiff that the judgment amounted to a link in the chain of title; that it, in effect, operated to transfer the Dean title to plaintiff; and that, under the recording act, it was competent evidence, and superior to the rights of defendant arising from mere possession. The cases of Hall v. Sauntry, 72 Minn. 420, 71 Am. St. Rep. 497, 75 N. W. 720, and Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144, are relied upon to support the position. Neither case is, however, in point. The rule that a judgment is admissible in evidence against all the world as a link in a party's chain of title does not apply to all judgments. It applies more particularly to judgments in partition proceedings, probate decrees, actions to foreclose mortgages and liens, judgments for the recovery of money, which become liens upon the property and are enforced by execution—in fact, to judgments rendered in all actions, the object of which is to acquire a title held by the adverse party. All such actions, except those for the recovery of money, are in rem, strictly, and there can be no question as to the admissibility of judgments rendered therein as links in the chain of title. The proceedings to enforce the money judgment are in rem, and the judgment is admissible in connection therewith. But actions to determine adverse claims and to remove clouds from a title, while equitable in their nature, are not, strictly speaking, actions in rem, except, perhaps, where the relief demanded is a transfer of title: Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773.

A judgment is admissible in evidence, therefore, as a link in the chain of title, only where it transfers title or renders valid a particular link, which without the judgment would be defective or invalid; and [154] the particular link thus rendered valid must, as to a person not bound by the judgment, be shown.

Prior to statutory enactments changing the rule, a decree of a court of equity in actions of this kind, while declaring the equitable estate or interest of plaintiff to exist, did not operate by its own intrinsic force to vest in him the legal title to the property. The decree was not itself a title, nor did it,

directly or indirectly, transfer the title from the defendant to the plaintiff. That rule has been changed and modified by statute. In many of these states the statutes declare expressly that such a decree shall operate to transfer the title of the land involved to plaintiff. In others, among which is our own state, the court is empowered by statute to so decree: 1 Pomeroy's Equity Jurisprudence, sec. 428; 3 Pomeroy's Equity Jurisprudence, sec. 1317; Gen. Stats. 1894, sec. 5864. By that statute the courts of this state are expressly empowered to pass title to land by judgment and decree where such relief is appropriate. But an ordinary judgment and decree quieting title to land, removing clouds, or determining adverse claims does not operate proprio vigore to vest or transfer title: Reed v. Reber, 62 Ill. 240. It can have that effect only when it so decrees in express terms.

The judgment relied upon by plaintiff in the case at bar does not purport to transfer the title of Dean to plaintiff, nor was that action brought for the purpose of acquiring that title. On the contrary, it was brought upon the expressly alleged claim that Dean had no title to the land, and for the purpose of extinguishing all title or claims of title held by him, and such was the relief granted by the judgment. It would be a departure from settled rules to hold that an ordinary judgment in an action to determine adverse claims to land, obtained by a total stranger to the title against a person appearing of record to be the owner, but who in fact was not, operates to transfer title, or constitutes a link in the chain of title, and is admissible in evidence as such against the true owner, who was not a party to nor bound by the judgment.

The judgment in the case of Berryhill v. Smith, 59 Minn. 285, 61 N. W. 114, was rendered in an action to foreclose a mechanic's lien—an action purely and strictly in rem. Plaintiff there, by his action to foreclose the lien, connected himself with the title to the land; and the judgment, with subsequent proceedings thereunder, operated to transfer to him the [155] title of the defendants in that action. Not so in the case at bar. For aught that appears in the record, plaintiff, at the time it commenced the action against Dean, was a total stranger to the title, for no evidence of title, lien upon, or interest in the property was exhibited or shown. Had it appeared that plaintiff's action was founded, in fact, upon some claim of title, and that the judgment of the court confirmed the same and extinguished the adverse claims of Dean, it

would have connected itself with the title, and its judgment, under the recording act of the decision in the Berryhill-Smith case, would constitute a link in the chain of title, and be prima facie superior to the actual possession of defendant, even though it did not appear that defendant was a privy of Dean.

The case of Hall v. Sauntry, 72 Minn. 420, 71 Am. St. Rep 497, 75 N. W. 720, is clearly distinguishable. It appears from the record in that case that the government of the United States granted to one Pierre Paul the land in controversy. It appears, further, that there were two persons by the name of Pierre Paul, distinguished in the record as Pierre Paul, Sr., and Pierre Paul, Jr. Pierre Paul, Sr., conveyed the land to one Park, and Park, in turn conveyed it to the Cloquet Lumber Company. The patent and both deeds were properly recorded. The Cloquet Lumber Company subsequently conveyed to one Rutledge, and Rutledge, in turn, to one William Sauntry. Neither the deed to Rutledge, nor the one from Rutledge to Sauntry, was recorded, and the land was vacant and unoccupied. With the title standing of record in the name of the Cloquet Lumber Company, though it had previously conveyed to Rutledge, Pierre Paul, Jr., claiming to be the patentee of the land, brought an action against the lumber company to determine adverse claims thereto. The lumber company answered, disclaiming any right or title; and judgment was ordered for the plaintiff—that he was the owner of the land, and that the lumber company had no estate or interest therein. Subsequently Paul, Jr., conveyed the land to Hall, plaintiff in the action of Hall v. Sauntry, 72 Minn. 420, 71 Am. St. Rep. 497, 75 N. W. 720. The deed was duly recorded. Sauntry claimed to own the land under his unrecorded deed, and Hall brought that action against him to determine adverse claims. The court held, on the facts stated, that the judgment recovered by Pierre Paul, Jr., against the Cloquet Lumber Company, was a link in the chain of title, and, as the defendant therein, Sauntry, acquired his title through the Cloquet [156] Lumber Company, defendant in the Pierre Paul action, he held in privity with the company, was bound by the judgment, and could not impeach it collaterally.

It appears from the record that Pierre Paul, Jr., was not a total stranger to the title, but, on the contrary, that he claimed to be the original patentee, and that Pierre Paul, Sr., had no title or interest therein, and no right to convey the land to

Park, through which conveyance the Cloquet Lumber Company acquired its title. It is true that the deed under which Sauntry claimed to own the land was executed prior to the commencement of the action in which the judgment was rendered, but it did not become operative or of force as to third parties until it was recorded, and the evidence shows that it was recorded subsequent to the entry of judgment. Sauntry was therefore a privy of the lumber company. In the case at bar, as has already been suggested, it does not appear whether defendant obtained whatever title he may have in the land in question through Dean, or that he holds possession in any way in privity with him. He was not, therefore, bound by the judgment under which plaintiff asserts title to the land. In order to render the judgment effective against him—he being in the actual possession of the land at the time it was rendered—the burden was upon plaintiff affirmatively to show title or right upon which it obtained the judgment, and which was thereby confirmed.

It was urged by plaintiff that defendant is a mere squatter, occupying no better position than an ordinary trespasser, and is in no position to question the validity of plaintiff's title. According to the offer of evidence, he was in the actual possession of the land at the time plaintiff obtained its judgment, and is still in possession, which possession amounts in law to prima facie title. Mere possession has been held sufficient, upon which to maintain an action to determine adverse claims to real property: Child v. Morgan, 51 Minn. 116, 52 N. W. 1127. And if sufficient for that purpose, it is certainly available in defense in an action in ejectment against a plaintiff who produces no competent evidence of title against the person so in possession: Miller v. Blackett, 47 Fed. 547. As defendant was not a party to the judgment, nor bound thereby as a privy of Dean, his actual possession of the land was notice to plaintiff, at the time the action against Dean was commenced, [157] of whatever rights he possessed—equivalent to the record of a deed, if he had one—and he has the right to be heard upon the question, if there be one, of the validity of the title or right upon which plaintiff obtained the judgment.

It follows that the trial court erred in excluding the offer of defendant to show his actual possession of the land, and the order appealed from is reversed, and a new trial granted.

A Judgment, to be Evidence against a party in another suit upon a different cause of action, must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon its merits in the first action: Richmond v. Sitterding, 101 Va. 354, 99 Am. St. Rep. 879. A judgment which establishes a paramount right to land as against one in possession is not prima facie evidence of the existence of a paramount title, or of eviction thereby, as against a defendant who had no notice of the action until after judgment: Wallace v. Pereles, 109 Wis. 316, 83 Am. St. Rep. 898. See, also, Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133. And a judgment of foreclosure is not res judicata as to the grantee of the mortgagee not made a party to the action and holding under a deed executed before the action was begun: Zeigler v. Maner, 53 S. C. 115, 69 Am. St. Rep. 842. A decree of divorce is not admissible in evidence against a stranger to it, to show that the property in controversy is a homestead: Roulston v. Hall, 66 Ark. 305, 74 Am. St. Rep. 97.

BIBB BROOM CORN COMPANY v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

[94 Minn. 269, 102 N. W. 709.]

CARRIERS—Negligent Delay in Shipment—Act of God.—If a common carrier negligently and carelessly delays the shipment of goods intrusted to him for transportation, whether they are perishable or not, and such goods are damaged while in transit by an act of God which could not reasonably have been anticipated, but which would not have caused the damage had there been no delay in shipment, the carrier is liable. Such negligence and unreasonable delay are such proximate or concurring causes as render the carrier liable in such case. (p. 363.)

CARRIERS—Liability for Delay in Shipment.—A common carrier to whom goods are delivered for transportation must forward them promptly and without unreasonable delay to their destination. Failing to do so, he may be held liable in damages therefor. (pp. 366, 367.)

Belden, Hawley & Jamison, for the appellant.

A. W. Selover, for the respondent.

270 BROWN, J. The facts in this case are as follows: On or about May 12, 1903, plaintiff delivered to defendant at Stafford, Kansas, a carload of broom corn, to be transported to Minneapolis, this state. The route of transportation was by way of Kansas City, and defendant was to forward the car at that point, the terminus of its line, over the Chicago Great Western road. The car reached the freight-yards of defendant at Kansas City on May 23d, but defendant wholly failed and neglected to send it forward or notify the Chicago Great

Western company of its arrival, though the evidence tends to show that immediately after the arrival of the car at Kansas City defendant sent a messenger to communicate the fact to the Great Western company, and that it was to be forwarded over its line, but through carelessness the messenger notified the Missouri Pacific company instead, and the Great Western was not informed of the matter at all. In consequence of the neglect of the messenger, the car remained in the yards of defendant until it was submerged by water in the great flood occurring during the last days of May and the first days of June at Kansas City, and the corn substantially destroyed. After the waters of the flood had receded, defendant, having first offered to forward the car to Minneapolis and plaintiff having refused to accept the corn in its damaged condition, caused the same to be sold, and tendered plaintiff the proceeds, less freight charges. Plaintiff brought this action to recover the value of the corn, alleging in its complaint that it was damaged and injured while in the possession of defendant, through its negligence and carelessness.

The delivery of the corn to defendant for transportation, and that it was damaged while in defendant's possession, are admitted in the answer, but it is alleged in defense that the damage was caused by an act [271] of God; that an unusual and extraordinary rainfall occurred at Kansas City and vicinity at the time the car was in its yards, causing the river to overflow its banks and submerge defendant's yards, the occurrence and extent of which could not have been foreseen or anticipated.

The trial court instructed the jury in part that, if the corn was destroyed by an act of God, unaccompanied by the concurrent negligence of defendant, plaintiff could not recover; but, in effect, left to the jury to say whether the delay in forwarding the car was negligence, and whether such negligence concurred in causing the damage. The jury returned a verdict for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The only assignments of error requiring consideration are those which challenge the charge of the trial court, in which the jury was instructed that, if the negligent delay of defendant in forwarding the car concurred in causing the injury or loss complained of, defendant was liable. It is contended with much earnestness and ability by defendant's counsel that, not-

withstanding there might have been negligent delay in forwarding the car from Kansas City to Minneapolis, but for which the corn would not have been damaged, yet the damage complained of resulted proximately from the flood, an act of God, and that, as plaintiff failed to show that defendant was chargeable with neglect in not foreseeing or guarding against the danger, no recovery can be had.

The question presented, then, is whether a common carrier is liable to the owner of goods delivered to him for transportation, which are damaged or destroyed by an act of God while in his possession, in consequence of a negligent delay in forwarding them, whether the act of God could reasonably have been anticipated or not. The question is an important one, and the authorities are not in harmony. We have considered it with care in all its bearings, and reach the conclusion that the carrier is liable.

As a general rule, applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's neglect and some other cause for which he is not responsible, including an act of God, he is nevertheless liable if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, [272] he was not bound to anticipate the interference of the intervening force which concurred with his own.

In the application of this rule, however, the authorities are not agreed. It is held in some states, as applied to common carriers, that a negligent delay in forwarding property delivered to them for transportation, which is injured by an act of God, or other cause for which they are not responsible, and could not reasonably have been anticipated, does not render the carrier liable, although the property would not have been damaged had there been no delay: 1 Am. & Eng. Ency. of Law, 2d ed., 596. Courts holding to this rule place their decisions on the ground that the act of God in such cases is the proximate cause of the injury, and not the delay in transportation: Herring v. Chesapeake etc. R. Co., 101 Va. 778, 45 S. E. 322. In other states the opposite doctrine is settled and adhered to: 1 Shearman & Redfield on Negligence, sec. 40.

The authorities are not at variance where the property damaged is perishable, or inherently susceptible to damage from climatic influences, as sudden changes in the weather. Changes in the weather are conditions which the carrier is

bound to anticipate as likely to occur, and for injuries resulting to perishable goods from such causes the carrier is liable where his negligent delay in forwarding them contributes to cause the injury. Goods in this class are those likely to be damaged by freezing or from excessive heat.

The authorities are at variance, in so far as negligent delay is concerned, only in cases involving property not perishable. The property in the case at bar was of that character, and would not have been damaged but for the flood that submerged the car while in the yards at Kansas City; neither would it have been damaged had defendant forwarded the car to Minneapolis promptly, and without unreasonable delay, as it was required by law to do. So the question is, Was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in fact causing the damage? It may be conceded, for the purposes of this case, that the flood was an act of God; that it was unprecedented, and beyond the reasonable anticipation of the most prudent residents of the vicinity where it occurred; and, unless we are to hold that the negligent delay did not render defendant liable, the case must be reversed.

[273] One of the first cases reported in the books, so far as our research has extended, wherein the carrier is held liable for negligent delay in transporting goods, not perishable, which were injured in transit by an overpowering cause not reasonably to have been anticipated, is Michaels v. New York, 30 N. Y. 564, 86 Am. Dec. 415. In that case there was a delay of several days in forwarding certain dry goods delivered to the defendant for transportation, which were damaged in transit by an act of God—a flood similar to the one in the case at bar. In disposing of the case and the contention of the railway company that it was exempt from liability for the reason that the injury complained of was the result of an act of God, the court said: "When a carrier is intrusted with goods for transportation, and they are injured or lost in transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy; and to avail himself of such exemption he must show that he was himself free from fault at the time. His act or negligence must not concur or contribute to the injury. If he departs from the line of his duty, and violates his contract, and while thus in fault, and in conse-

quence of that fault, the goods are injured by an act of God, which would not otherwise have caused the injury, he is not protected."

That case has been consistently followed and adhered to in New York, and is now the settled law of that state. In Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 416, it was held that, if a common carrier unreasonably delays goods received by him for transportation, and they are injured by an act of God in consequence of such delay, he must show, to exempt himself from liability, that the delay did not contribute to or concur in the injury. In Condict v. Grand Trunk Ry. Co., 54 N. Y. 500, it was said that it is the duty of a common carrier to forward goods delivered to him for transportation promptly, and within a reasonable time, and, if a loss occurs in which his negligence in part concurs, he is liable: See, also, Dunson v. New York Cent. R. Co., 3 Lans. (N. Y.) 265.

This doctrine has been followed and applied in other states. In Wolf v. American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406, the court laid down the general rule in such cases in the following language: "The act of God which excuses a carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And when the loss [274] is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In Wald v. Pittsburg etc. R. Co., 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, 35 L. R. A. 356, it appeared that plaintiff had purchased of defendant a ticket entitling him to passage from Chicago to New York upon one of its trains known as the "Limited Express." He was also entitled, as a matter of law, to have his baggage, which was checked at the time he procured his ticket, forwarded by the same train. The baggage was, however, by the negligence of the baggageman, forwarded from some point on the line by the day express, a train following the "Limited Express" a number of hours later. Plaintiff reached his destination in safety, but the day express which carried his baggage was overtaken by a flood at Johnstown, Pennsylvania—an act of God—and the baggage destroyed. The court held the defendant liable, saying in the opinion that the unnecessary delay of a carrier which subjects goods in his possession to

loss by an act of God, which they would not otherwise have met with, is in itself such negligence as will render him liable.

In Louisville etc. R. Co. v. Gidley, 119 Ala. 523, 24 South. 753, it appeared that defendant delivered to plaintiff, a common carrier, at Gadsden, Alabama, goods to be transported to Philadelphia. The carrier unnecessarily delayed forwarding them for some days, and they were in the meantime destroyed by fire, for which plaintiff was in no way responsible, and for which it could not, under its contract, have been made liable to the owner of the goods. The court held that the unnecessary delay in shipment was the proximate cause of the loss, and that the carrier was liable.

This rule of liability is followed in Kentucky: Cassilay v. Young, 4 B. Mon. 265, 39 Am. Dec. 505; Hernsheim v. Newport (Ky.), 35 S. W. 1115. Also in Maryland: Baltimore etc. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643. The foregoing cases all involve property not perishable, and the negligent delay was held either the proximate cause of the loss, or that it concurred with the act of God in causing the damage and rendered the carrier liable. Other cases, more or less in point, may be found collected in Gilson v. Delaware, 65 Vt. 213, 36 Am. St. Rep. 839. See, also, Deming v. Grand Trunk Ry. Co., 48 N. H. 455, 2 Am. Rep. 267; Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Campbell v. Morse, Harp. (S. C.) 468; Meyer v. Vicksburg etc. R. Co., 41 La. Ann. 639, 17 Am. St. Rep. 408, 6 South. 218; Missouri etc. R. Co. v. McFadden, 89 Tex. 138, 33 [275] S. W. 853; Pruitt v. Hannibal etc. R. Co., 62 Mo. 527. And the rule was, in effect, laid down, though the precise question here under consideration was not there involved, in Jones v. Minneapolis etc. R. Co., 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893.

We have examined the authorities holding the opposite of this doctrine, and, while the courts adhering to the same are of eminent standing, we have no difficulty in adopting the view of the cases above cited. The rule that permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault seems to us unsound. It is based on too strict an application of the rule of proximate cause. It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car

arrived at its yards in Kansas City on May 23d, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival prior to May 29th, and, had this been done, the corn would not have been damaged. If defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense.

Every reason in equity and justice relieves a carrier from the performance of his contract and from liability for injuries to property in his custody for transportation, resulting exclusively from an act of God, or other inevitable accident or cause over which he has no control, and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If, but for his negligence, the loss would not have occurred no sound reason will excuse him, and he should not be relieved by an application of the [276] abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong, and if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable: Davis v. Garrett. 6 Bing. 716.

Our conclusions are that the trial court correctly instructed the jury that the record presents no reversible errors, and the order appealed from is affirmed.

The Liability of a Carrier, where it negligently delays the forwarding of goods, and they are destroyed by an act of God, is discussed in the monographic notes to Norris v. Savannah etc. Ry. Co., 11 Am. St. Rep. 362-365; Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 838-840. The decision in the principal case on this question may be said to have the support of Wald v. Pittsburg etc. R. R. Co., 162 Ill. 545, 53 Am. St. Rep. 332; Jones v. Minneapolis etc. R. R. Co., 91 Minn. 229, 103 Am. St. Rep. 507; Meyer v. Vicksburg etc. R. R. Co., 41 La. Ann. 639, 17 Am. St. Rep. 408; and to be opposed by Yazoo etc. R. R. Co. v. Millsaps, 76 Miss. 855, 71 Am. St. Rep. 543; Davis v. Central etc. R. R. Co., 66 Vt. 290, 44 Am. St. Rep. 852.

GILBERT v. McDONALD.

[94 Minn. 289, 102 N. W. 712.]

HOMESTEADS, SOLDIER'S ADDITIONAL — Conveyance— Title by Relation—Trespass.—An assignee of a soldier's additional homestead, upon properly filing an application for a specific tract of land, acquires an equitable title therein, which ripens into a legal title relating back to the date of application upon issuance of patent, and such equitable interest may be conveyed by quitclaim deed, and when patent issues the legal title inures to the benefit of the grantee, who may then maintain an action for trespass committed upon the land after the date of application and before the issuance of the patent. (pp. 370, 371.)

R. R. Briggs, for the appellants.

Davis, Hollister & Wilson, for the respondents.

289 LEWIS, J. October 26, 1901, Samuel V. Gilbert filed application in the land office at Duluth, as assignee of a soldier's additional homestead certificate to the northwest quarter of the southwest quarter of section 9, town 62 north, of range 1, Cook county, Minnesota. The following November 20th, he executed a quitclaim deed of the premises to plaintiffs. Between December 1, 1902, and March 7, 1903, defendants committed a trespass upon the land by cutting and carrying away timber therefrom, 290 which, according to the verdict rendered, was of the value of one hundred and fifty dollars. March 16, 1903, the application was allowed by the general land office at Washington, and March 24, 1903, the necessary fees and disbursements were paid at the land office in Duluth, and the usual receiver's certificate issued. In April, 1903, Gilbert died. Patent issued June 1, 1903. This action was commenced June 29, 1903, for the purpose of recovering damages for the trespass. Defendants were total strangers to the title, and defended wholly upon the ground that at the time of the trespass plaintiffs had no title, the same being in the United States.

Plaintiffs cannot maintain an action unless upon the theory that at the time of the execution of the quitclaim deed Gilbert possessed an inchoate or equitable title, which was subject to be conveyed by such a deed, and upon the subsequent issuance of the patent the legal title related back to the application, October 26, 1901, and inured to the benefit of his grantees. It was held in Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896, that, where an application for the entry of lands was legally

and properly made under assignment of a soldier's additional homestead right, the right to possession of the land inured to the person making such entry as against a trespasser; that, while the applicant did not acquire full title to the land through her application, yet it entitled her to an inchoate interest therein, with the right of possession as against trespassers, and when the patent issued it related back to the date of the application.

The doctrine of relation and the effect of the receiver's certificate as evidence under section 5754 of the General Statutes of 1894, is referred to in the case of Winona etc. R. Co. v. Randall, 29 Minn. 283, 13 N. W. 127, where it was held that a pre-emption certificate issued by the land office was prima facie evidence of title, not only at the time of the entry, but related back to the time of settlement upon the land. Under the authorities referred to, we consider the question settled in this state that when patent issues it furnishes evidence of title in the patentee from the very inception of the proceedings to acquire title.

The question is: Was the interest which Gilbert acquired under his application of such character that it could be conveyed by quitclaim deed, and did the patent, when issued, inure to the benefit of the grantees? The Revised Statutes of the United States of 1878, section 2448 (2 U. S. [201] Comp. Stats. 1901, 1512), provide that when a patent issues to a person deceased at its date title shall inure to and vest in the heirs, devisees, and assigns of such person, the same as if it had been issued to him during life. Consequently, the fact that Gilbert died before patent issued has no bearing on the case. If filing a soldier's additional certificate and making application for the land vested an equitable title in Gilbert, such interest could be conveyed by quitclaim deed of the premises, and no other interest was intended to be conveyed except such equitable interest. No after-acquired title was conferred by the patent, and hence a quitclaim was as effective as a warranty deed could have been.

Whether his interest was of an equitable nature, or, as it has been described, an inchoate title, may be determined, we think, from the nature of the certificate. In most of the cases passing upon this question the receiver's receipt or certificate of entry had issued from the land office at the time of the conveyance by the entryman: Landes v. Brant, 10 How. 348,

13 L. ed. 449; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Kingman v. Holthaus (C. C.), 59 Fed. 305. The case of French v. Spencer, 21 How. 228, 16 L. ed. 97, is very similar to this one. The government had authorized the issuance of land warrants to Canadian volunteers in the war of 1812, and the soldier named in a certain warrant located a tract of land, and a few days thereafter conveyed it; it was held that the deed of conveyance was sufficient to pass the interest of the grantor, and that a patent subsequently issued to the original beneficiary inured to the benefit of the purchaser, and related back to the date of the entry, and that the heir of the grantor was estopped from setting up a legal title under the patent.

Under the provisions of section 2306 of the Revised Statutes of the United States (2 U. S. Comp. Stats. 1901, 1415), every soldier and sailor who had theretofore entered a homestead for less than one hundred sixty acres was entitled to enter so much land as, when added to the quantity previously entered, should not exceed one hundred sixty acres. When the proper party secures a certificate from the government showing that he is entitled to the additional bond, he is not required to comply with the provisions of section 2304 (2 U. S. Comp. Stats. 1901, 1413), viz., to settle upon the land and cultivate the same for the requisite number of years before making final proof. The certificate itself furnishes the evidence to authorize the [292] holder to select the lands desired and to make the application by filing the same in the proper land office. This statute was amended in 1894 by providing that such certificates might be sold and assigned, and the purchasers and assignees were authorized to make entries thereunder, patent to be issued in the name of the assignee. The effect of these provisions was that upon issuing such a certificate the government bound itself to approve of the entry when made, and to issue a patent thereon.

It seems to us that a selection of land and a filing of the application under a soldier's additional certificate is just as much the inception of an interest in the land as is the issuance of a land office certificate in the case of a pre-emptor or homesteader. Again, the statute itself seems to recognize that such an application vests an equitable interest in the applicant, for the reason that the amendment describes the application as an entry, and Congress did not see fit to restrict the right to alienate the interest between the time of entry and the issuance of a patent.

Upon this view of the title theory, Gilbert was possessed of an interest that could be conveyed by quitclaim deed. The case of Olson v. Minnesota etc. R. Co., 89 Minn. 280, 94 N. W. 871, supports these views, and is not in conflict, for, treating this action as one of trespass quare clausum, the legal title was vested in plaintiff at the time of the commencement of the action. It is not necessary to decide what the rights of the parties were prior to the issuance of the patent or the receiver's receipt. It may be that during such period the United States government alone could have prosecuted defendants for the trespass. Such being our conclusion, the documentary evidence was properly received.

Judgment affirmed.

An Entryman Under the Federal Homestead laws may bring an action for an injury to the land, although he has not yet made final proof: Wendel v. Spokane County, 27 Wash. 121, 91 Am. St. Rep. 825. As to whether he can make a sale, mortgage, or lease of his interest, see Weber v. Laidler, 26 Wash. 144, 90 Am. St. Rep. 726; Butterfield Lumber Co. v. Hartman, 82 Miss. 494, 100 Am. St. Rep. 644, and cases cited in the cross-reference note thereto; Carley v. Gitchell, 105 Mich. 38, 55 Am. St. Rep. 428. It has been held that an entryman under the timber culture act has not, before receiving a final certificate, a devisable interest in the land: Kelsay v. Eaton, 45 Or. 70, 106 Am. St. Rep. 662.

SODINI v. SODINI.

[94 Minn. 301, 102 N. W. 861.]

JUDGMENTS—Collateral Attack.—A judgment of a court of general jurisdiction cannot be collaterally attacked unless the record affirmatively shows want of jurisdiction. (p. 373.)

JUDGMENTS by Default in Divorce—Collateral Attack.—A default judgment in divorce proceedings before a court of competent jurisdiction is no more subject to collateral attack than any other judgment. (p. 373.)

JUDGMENTS by Default in Divorce—Collateral Attack—Return.—If the language of the return of service of the summons and complaint in a proceeding for divorce resulting in a judgment by default fairly admits of an interpretation which will make such return legal and sufficient, it should be so construed upon collateral attack. (p. 373.)

DIVORCE—Default Judgment—Return.—If the return upon which a default judgment in divorce is based shows that the summons and complaint were properly and personally served on the defendant, it is immaterial that the officer making the service also certified that the name by which the defendant was described in such papers was not his true name, but an alias. (p. 374.)

DIVORCE.—Personal service of complaint and summons in divorce proceedings may be legally made outside the state. (p. 374.)

DIVORCE—Alimony to Defendant in a Suit to Annul a Marriage.—In an action to annul a marriage, the defendant may secure a divorce on the ground of adultery and cruel and inhuman conduct, and therefore the court may award defendant temporary alimony therein. (pp. 374, 375.)

Lane & Nantz and H. S. Mead, for the appellant.

S. J. Donnelly and H. Weiss, for the respondent.

302 JAGGARD, J. The original complaint herein sought an absolute divorce from defendant because of adultery. The answer, after a general denial, also sought an absolute divorce because of adultery and cruel and inhuman treatment. Subsequently plaintiff amended his complaint, and therein sought to annul the marriage of plaintiff to defendant because of the following facts. In 1894, at Milwaukee, Wisconsin, the defendant married Robert J. Nelson. In 1895 she began an action in the district court of Hennepin county, Minnesota, where she was then residing, against Robert J. Nelson, for divorce, on the ground of cruel and inhuman treatment. Personal service of the summons and complaint therein was thereafter made upon the defendant at Philadelphia, Pennsylvania. Such proceedings were thereafter duly had in said action that on December 12, 1895, a judgment of divorce was rendered therein in favor of the plaintiff. On June 7, 1902, defendant became the wife of this plaintiff. In November of the following year this action for divorce was begun. The plaintiff, in his amended complaint, claimed that this judgment of divorce in said case of Nelson v. Nelson is void upon its face, because the record affirmatively shows that the summons and complaint therein were never in fact served upon the defendant, Nelson. This claim is spelled out of the officer's return of the service of the summons and complaint upon the defendant therein at Philadelphia, hereafter stated.

The defendant by her answer denied her incapacity to marry plaintiff, and alleged a regular divorce from the former husband, and asked for attorney's fees, suit money, and alimony. Plaintiff demurred to this answer on the grounds (1) that the aforesaid facts relating to the divorce of Clara Nelson from Robert J. Nelson failed to show a valid divorce; (2) that, in a proceeding to annul a marriage, no allowance for temporary alimony could be allowed upon a counterclaim

seeking a divorce on the grounds of adultery and cruel and inhuman treatment. From an order overruling this demurrer, and from an order allowing temporary alimony, counsel fees, and suit money, plaintiff appealed.

1. A judgment of a court of superior or general jurisdiction cannot be collaterally attacked unless the record affirmively shows want [303] of jurisdiction. The cases sustaining this familiar and undisputed rule will be found collected in 30 Century Digest, secs. 933, 934; Black on Judgments, secs. 224, 263. A number of federal cases will be found collected in Southern Pac. R. Co. v. United States, 168 U. S. 1, 51, 18 Sup. Ct. Rep. 18, 42 L. ed. 355. And see Turrell v. Warren, 25 Minn. 9; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Gulickson v. Bodkin, 78 Minn. 33, 79 Am. St. Rep. 352, 80 N. W. 783; Hotchkiss v. Cutting, 14 Minn. 537 (Gil. 408); State v. McDonald, 24 Minn. 38. A default judgment in divorce proceedings is no more subject to such collateral attack than any other judgment: In re Newman's Estate, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; 2 Current Law, 595; Ruppin v. McLachlan, 122 Iowa, 343, 98 N. W. 153.

In Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 691, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, Justice Brewer said: "But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. The essence of estoppel by judgment is that there has been a judicial determination and not upon what evidence, or by what means it was reached." The conclusive presumption of validity extends to the return of process upon which the judgment is based: 40 Century Digest, sec. 193. All intendments are indulged in support of the judgments of courts of general superior jurisdiction: 30 Century Digest, sec. 934. Thus informalities, including errors in the name of the person designated in the return of service of summons, are not sufficient basis for indirect impeachment of a judgment: Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; Smith v. Bradley, 6 Smedes & M. 485; Campbell v. Hays, 41 Miss. 561; Crizer v. Gorren, 41 Miss. 563; Rigby v. Lefevre, 58 Miss. 639; Kelly v. Harrison, 69 Miss. 856, 12 South, 261; Oswald v. Kampmann (C. C.), 28 Fed. 36; Peck v. Strauss, 33 Cal. 678; Wilson v. Call, 49 Iowa, 463. And if the language of the return fairly admits of a construction which will

make the return legal and sufficient, it should be so construed: Curtis, J., in Coggswell v. Warren, 1 Curt. 223, Fed. Cas. No. 2958; Murfree on Sheriffs, sec. 864.

Plaintiff here contends that the judgment of divorce of the defendant from her former husband in the case of Nelson v. Nelson is void even on collateral attack; that the proof of service therein shows on its face the service of the summons and complaint, aimed at a man whose true name was Robert J. Nelson, upon a man whose true name was [304] John S. Bradley, but who sometimes passed under the name of Robert J. Nelson; and that, inasmuch as the person whose real name is John S. Bradley is not the same as one whose true name is Robert J. Nelson, the court never acquired jurisdiction. The sheriff serving the summons and complaint, however, certified that he personally knew the defendant, that at a specified time and place he served said papers upon said defendant by handing to and leaving him a true and correct copy thereof, and that he knew the person served as aforesaid to be the person named as the defendant therein. It is true that he also certified that the defendant's true name was not Robert J. Nelson, but John S. Bradley, and that the name Robert J. Nelson was an alias. This does not, however, take this case out of the rule that every intendment is in favor of a construction which will sustain the judgment. There was nothing in the summons and complaint, as served, to deceive the defendant. The real person was in fact served. It is the intention of the law that the service should be made, not on the name, but on the person. Accordingly, the construction applied by the trial court, sustaining the judgment, is the proper one.

2. It was further urged that there was no authority for personal service of summons and complaint outside the state. Revised Statutes of 1851, page 335, chapter 70, section 51, authorized such service. After a learned examination of the statutes, counsel for plaintiff asserts that this provision was repealed in 1866, and not re-enacted until 1901, and that, since the divorce of defendant herein from her former husband was procured in 1895, and was based on such service, it is void. It is not necessary to consider here in detail the merits of this argument as to such legislative history. General Statutes of 1894, sections 4796, 4797, sufficiently, if inferentially, authorize the actual service here made.

3. There is no merit to the further contention in plaintiff's demurrer that, since this is an action to annul marriage, the

defendant cannot therein secure a divorce on the ground of adultery and cruel and inhuman conduct, and that therefore the court may not order temporary alimony. Especially in view of the history of the pleadings in the case, the trial court properly held that, "There can be no good reason given why the rights of the respective parties in an action of this kind may not be litigated and determined without driving them to separate lawsuits. [305] To deny the defendant this relief in this action would be to prolong these domestic troubles and multiply the lawsuits between the parties, and largely increase the costs and expenses of litigating their respective rights."

4. This court has examined the orders for alimony and suit money, and finds no abuse of the discretion of the trial court or other error therein.

The orders appealed from are sustained.

The Fact of Service of Process, not the Proof thereof, gives a court jurisdiction: Burke v. Interstate Sav. etc. Assn., 25 Mont. 313, 87 Am. St. Rep. 416, and cases cited in the cross-reference note thereto. Affidavits of service of summons by publication against a nonresident defendant in an action for divorce, and recitals thereof in the judgment, are conclusive upon collateral attack: Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 146.

A Judgment by Default, if simply erroneous and not void, can be attacked only upon motion or by appeal, and by the party aggrieved: Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 146.

TURNER v. FRYBERGER.

[94 Minn. 433, 103 N. W. 217.]

EXECUTORS AND ADMINISTRATORS—Attorney for, Purchase by.—An attorney for an administrator of an estate has no right to purchase an outstanding life estate in real property of which such administrator is trustee, when such purchase is made for the personal use of such attorney, and to make a profit by the sale of the land, and the administrator must account to the estate for the amount realized as profit from such sale. (pp. 377, 378.)

H. E. Fryberger, for the appellant.

J. E. Miner and W. M. Babcock, for the respondent.

[434] LEWIS, J. Appeal was taken to the district court from an order of the probate court of Hennepin county al-

lowing the account of the administrator of the estate of Jane Robbins, deceased.

The facts as found by the trial court are: W. O. Fryberger was appointed administrator with the will annexed, and employed his brother as an attorney for himself, as administrator, and for the estate. Mrs. Robbins left, surviving her, a husband, Nathan J. Robbins, and three children by previous marriages. At the time of her death she was seised and possessed of a house and lot in Minneapolis occupied by her as a homestead, in which her surviving husband succeeded to a life estate. May 20, 1901, the attorney of the administrator purchased from Robbins his life estate for two hundred and fifty dollars, and received a deed therefor. June 1, 1901, the administrator sold the reversionary interest in the property for seven hundred dollars, and on the same day, to the same party, the attorney sold the life estate for seven hundred dollars, and separate deeds were executed conveying such interests to the purchaser. In his final account the administrator accounted for the seven hundred dollars received from the sale of the reversionary interest. It was also found as a fact that the same attorney had been employed by Robbins to act for him in connection with the estate, for which services he was paid seventy-five dollars. The trial court allowed the administrator fifty dollars for his personal services and one hundred dollars for his attorney. The court granted a motion for a new trial, without stating the grounds of the order.

The only question which we deem it necessary to consider on this appeal is whether the attorney occupied such a position with reference to the administrator and the estate that he was prohibited from profiting by the purchase and sale of the life estate. According to the annuity tables, Robbins' expectancy of life was a little over eleven years, [435] he being then sixty-four. There were some debts outstanding, and it was provided by the will that the property should be sold and the proceeds disbursed in a certain way. It was apparent that the property would sell more advantageously when the two interests were united than when sold separately, as neither interest would command its real value if offered for sale separately. It therefore became incumbent upon the administrator to use all reasonable means to unite with the owner of the life estate in dispos-

ing of the property. Neither the probate court nor the district court found what the value of the life estate was, but the evidence shows that it was agreed between the administrator and the attorney who purchased the life estate that the two interests were of equal value. It also appears that the commission appointed by the probate court determined the value of the life estate to be seven hundred dollars, but it does not appear that the court adopted the decision or fixed any value. There is some evidence tending to show that the attorney and the administrator made attempts to dispose of the property in conjunction with the surviving husband, and it also appears from the testimony of the attorney that he consulted the probate court with respect to the expediency of himself making such purchase, and was advised that it would be proper to do so.

The court is of the opinion that the attorney of the administrator was acting in good faith, believing he had a right to purchase the life estate and dispose of it at a profit to himself, and also acted in good faith in advising the administrator that he was not required to account therefor. It seems that the district court, in cutting down the fees of the administrator and his attorney from the amount allowed by the probate court, took into account the fact that a profit had been made in purchasing and disposing of the life estate. The principles governing a trustee with reference to property embraced within the trust are fully enumerated in King v. Remington, 36 Minn. 15, 29 N. W. 352, and subsequent cases. In respect to the purchase of property belonging to the cestui que trust by the trustee, the rule is that the relation of confidence is in itself sufficient, and no other fact than that relation need be shown. The rule is entirely independent of the fact whether any fraud has intervened, and it is to avoid the necessity of any such inquiry that the rule takes so general a form. Again, the rule stands on the moral obligation to refrain from [436] placing one's self in relations which ordinarily excite a conflict between self-interest and integrity. No party can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use: Gilbert v. Hewetson, 79 Minn. 326, 79 Am.

St. Rep. 486, 82 N. W. 655; Shadewald v. White, 74 Minn. 208, 77 N. W. 42; Donahue v. Quackenbush, 75 Minn. 43, 77 N. W. 430; and many other cases.

No distinction can be drawn between the administrator as the trustee of the estate, and his attorney. The attorney is simply the representative or the agent, and the administrator the principal. It necessarily follows that, if the administrator were himself prohibited from dealing in the life estate for his own profit, so must his representative and attorney be likewise prohibited. The position is not changed by the fact that the life estate was property not belonging to the estate, but existed as an independent right in the surviving husband, who had the power of disposing of it to whomsoever he would. The point is that there were conflicting interests between the two estates. If the administrator was required to realize the greatest amount which he reasonably could in the execution of his trust, in so doing he necessarily would come in conflict with the owner of the life estate, and his attorney could not represent the life estate owned by himself, and at the same time, as attorney, the reversionary interest under control of the administrator. The position of the attorney in this case is analogous to that of a broker who attempts to act for both parties to a transaction. "The vendor, in the employment of an agent to sell his property, bargains for the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit": Dratt v. Sonnesyn, 86 Minn. 55, 90 N. W. 115.

Under the facts of this case the parties are brought directly within the rule that the administrator was chargeable with the amount realized, and holds the same in trust for the estate: Perry on Trusts, 5th ed., 197.

Order affirmed.

Persons Occupying Fiduciary Relations in respect to property are disabled from acquiring for their own benefit the property committed to their custody and management: Gilbert v. Hewetson, 79 Minn. 325, 79 Am. St. Rep. 486, and cases cited in the cross-reference note thereto. A purchase of the trust property by the trustee, however, is not necessarily void: Shelby v. Creighton, 65 Neb. 485, 101 Am. St. Rep. 630; and a purchase by an administrator at his own sale is voidable merely: Mason v. Odum, 210 Ill. 471, 102 Am. St. Rep. 180.

HABEGGER v. FIRST NATIONAL BANK

[94 Minn. 445, 103 N. W. 216.]

BANKRUPTCY — Preferences—Deposit in Bank.—Money deposited in a bank in the due course of business by an insolvent within four months of the time that he is adjudged a bankrupt is not a transfer of property constituting a preference within the meaning of the national bankrupt act, and the bank may apply the amount of such deposit upon a note due from such insolvent to it. (pp. 380, 381.)

F. J. Leonard and F. C. Irwin, for the appellant.

E. Southworth and W. H. Lightner, for the respondent.

446 BROWN, J. Appeal from an order overruling plaintiff's demurrer to defendant's answer.

The complaint alleges that on October 31, 1903, and for a long time prior thereto, H. Burton Strait and Henry Schreiner were engaged in the banking business at Jordan, this state; that on the day named the bank was insolvent, and ceased to do business as such; that thereafter, on December 5, 1903, Strait and Schreiner were duly adjudged bankrupts in bankruptcy proceedings commenced in the United States court on November 6, 1903, in which proceedings plaintiff was appointed their trustee; that on said October 31st defendant was indebted to Strait and Schreiner in the sum of four thousand five hundred and fifty-nine dollars and sixty-eight cents, for which sum plaintiff, as their trustee, demanded judgment.

The answer of defendant, after admitting and denying certain allegations in the complaint, not here material, alleged that for more than seven months prior to October 31, 1903, said H. Burton Strait alone and individually was doing business as a private banker at Jordan, this state, and was on said day indebted to defendant in the sum of eight thousand five hundred and twenty-four dollars and seventy-four cents, being a balance unpaid on a promissory note executed by him and one J. R. Strait, an accommodation maker, on March 25, 1903, payable four months from that date. The answer affirmatively alleged that Strait, as such private banker, became insolvent, and that plaintiff was duly appointed trustee of his estate; that at the time he became insolvent, October 31, 1903, he had on deposit with defendant the sum of three thousand and fifty-nine dollars

and sixty-eight cents; that upon being advised that Strait had become insolvent, and had ceased to do business as a banker, defendant on that day applied the amount so to his credit on its books as payment of his promissory note.

For aught that appears from the pleadings, the money was deposited with defendant in the due course of business, and not with any purpose or intent of preferring defendant as a creditor. Plaintiff demurred to the answer on the ground that it failed to state facts constituting a defense. The demurrer was overruled.

Three contentions are made in this court by appellant: 1. That [447] the application by defendant of the amount due Strait as payment of the promissory note held by it against him constituted an unlawful preference within the meaning of the bankruptcy act, it having been made within four months of the date on which Strait was adjudged a bankrupt; 2. That the indebtedness was not a proper setoff, and defendant could not apply it in payment of the promissory note, for the reason that the law of setoff does not authorize the application of an individual claim to the payment of a joint obligation—that, as the credit in the hands of the bank was due Strait, it could not be applied in payment of the note executed by Strait and another; and 3. That defendant waived the right of setoff by not applying it upon the note against Strait when the money was first deposited by him.

1. The first question, namely, whether the application of the credit in the hands of the bank in payment of its note against Strait was an unlawful preference within the meaning of the bankruptcy act, has been disposed of adversely to plaintiff's contention by the supreme court of the United States, the decision of which court is final upon all questions involving the construction of that act: New York County Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. Rep. 199, 48 L. ed. 380. The pith of the decision in that case is found in the syllabus (24 Sup. Ct. Rep. 199), which is as follows: "Insolvents, by depositing money in a bank upon an open account, subject to check, do not thereby make a transfer of property amounting to a preference, which, under the bankruptcy act of 1898, chapter 541, 30 Statutes at Large, 562 (U. S. Comp. Stats. 1901, p. 3445), section 60a, will deprive the bank of its right under section 68a to set

off the amount of such deposit remaining to the depositor's credit on the date of their adjudication in bankruptcy, and to prove its claim against the bankrupt estate for the balance." This conclusively disposes of this point, and it is unnecessary to extend this opinion by a discussion of the question.

2. In view of the allegations of the answer, which are admitted by the demurrer, the rules of law invoked by plaintiff on the subject of the law of setoff do not apply, and it is unnecessary to consider whether a claim in favor of one person may be set off against the debt due jointly from that person and another. The answer alleges that Strait was alone engaged in the banking business at Jordan, and that the credit for money deposited with defendant was deposited by and [448] belonged to him. It further alleges that the promissory note made and delivered to defendant by Strait and another represented the debt of Strait, and that the other person signed and executed the note with him as an accommodation maker. These facts, being admitted by the demurrer, render inapplicable the argument of counsel that an individual debt cannot be set off against a joint debt. We do not, therefore, leem it necessary to enter into a discussion of the law of setoff, and hold, on the facts set forth in the answer, that defendant had the right to apply the credit due to Strait on his promissory note.

3. There is no merit in the third contention—that defendant waived his right of setoff in not applying the money on the promissory note when it was first deposited.

Order affirmed.

Where a Bankrupt **gives a creditor his note indorsed by a third person, this is not a fraudulent preference, as the advantage secured by the creditor is not out of the bankrupt's estate: Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438.**

CAVANAUGH v. PENLEY.

(64 Minn. 265, 66 N. W. 973.)

Bankruptcy—Construction of Act.—That portion of the national bankruptcy act providing that "all liens, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of the petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," applies to voluntary, as well as involuntary bankruptcy. (p. 283.)

Bankruptcy—Exemptions—Discharge of Liens.—A provision of money belonging to an insolvent, which four months of the time he is adjudged a bankrupt is dissolved and rendered void by the bankruptcy proceedings, although the insolvent made no selection in his schedule of assets to the last that the indebtedness had been paid. (pp. 283, 286.)

Bankruptcy—Liens Discharged by—Annulment of Judgment.—A judgment entered against an insolvent person, upon a promise made existing against him at the time he was adjudged a bankrupt, but entered before the final discharge in bankruptcy, is annulled and extinguished by such discharge, and the bankrupt has a right, after obtaining his discharge in bankruptcy, if he proceeds within a reasonable time, to move execution upon such judgment perpetually stayed. (p. 284.)

J. M. Davidson and L. Peabody, for the appellant.

D. A. Keith, for the respondent.

BROWN, J. The facts material to the questions controlling the decision in this case are as follows: The action was commenced in the municipal court of St. Paul on August 14, 1893. Defendant being a nonresident, summons was served upon him by publication. The garnishee summons was served upon the garnishee, and it appeared by its attorney at the time specified therein, August 25, 1893, and disclosed that it was indebted to defendant in the sum of one hundred and twenty-nine dollars and thirty-five cents. It was, in connection with and as a part of the disclosure, stated that defendant was a married man, and resided in the state of Iowa. On September 27, 1893, within the period of four months from the commencement of the action, defendant was on his own petition adjudged a bankrupt by the United States district court for the northern district of Iowa. Such proceedings were thereafter had in that court that he was on March 3, 1894, duly discharged. Defendant scheduled and disclosed the indebtedness due him from the garnishee in the bankruptcy proceedings, and claimed the same as exempt under the laws of the state of Iowa, where he resided. No assignment formally

being disclosed by the bankrupt, no trustee of his estate was appointed but the proceedings in bankruptcy were in all things regular, and his discharge in accordance with the bankruptcy act. On October 1, 1903, default judgment was entered against defendant, but no judgment was entered against the garnishee until June 11, 1904, and after defendant's discharge had been issued to him.

Defendant moved the court below for an order discharging the garnishment and releasing to him the money held thereunder, and for an order perpetually enjoining further proceedings on the judgment in the main action, or that it be vacated and defendant permitted to answer, setting up his discharge in defense. The motion was denied, and defendant appealed.

The record presents two principal questions: 1. Whether the garnishment proceedings were dissolved by operation of law by the bankruptcy proceedings; and 2. Whether the court erred in denying the motion perpetually to enjoin collection of the judgment against defendant. [507] If these questions be answered in the affirmative, the order appealed from must be reversed.

1. Section 67, subdivision f, of the bankruptcy act of July 1, 1898, chapter 541, 30 Statutes, 565 (U. S. Comp. Stats. 1901, 3450), provides: "That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt."

There is no ambiguity in this provision of the act, and it would seem to require no discussion to demonstrate that it means what its plain language imports. But it is urged by plaintiff that it has no application to the case at bar, for the reason that defendant became a voluntary bankrupt; that, as the bankruptcy proceedings were initiated and conducted to a conclusion on his voluntary petition, the case does not fall within the scope or purpose of the section, construed in connection with the whole act. In other words, his contention is that this provision of the law applies solely to involuntary bankrupts. Several cases in the United States district court

are cited to sustain this contention: In re DeLue (D. C.), 91 Fed. 510; In re Easley (D. C.), 93 Fed. 419; In re O'Connor (D. C.), 95 Fed. 943. They fully bear out respondent's contention; but, it seems to us, they are at variance with the whole purpose and object of the bankruptcy act, and should not be followed. The contrary rule was laid down by the United States circuit court of appeals, seventh circuit, in Re Richards, 96 Fed. 935, 37 C. C. A. 634. It was there held that the section of the bankruptcy act above quoted, properly construed, applied to voluntary as well as involuntary cases, the decision being based in part upon section 1, subdivision 1, of the act of July 1, 1898, chapter 541, 30 Statutes, 544 (U. S. Comp. Stats. 1901, 3418), which provides that a person "against" whom a petition has been filed shall include a person who has filed a voluntary petition.

We think this decision, which is well considered, and by a court higher in authority than the federal district court, settles the law on [508] this subject, and must be our guide in disposing of the case at bar. To sustain plaintiff's contention would open the door to gross frauds. If this provision of the act were held to be inapplicable to cases of voluntary bankruptcy, it would facilitate the efforts of insolvent persons to make preferences and prevent a fair distribution of their property among all their creditors. A person in contemplation of bankruptcy proceedings could induce a number of his creditors, whom he chose to prefer, to bring actions against him, attach and levy upon his property, thereafter file a petition in bankruptcy, and thus secure to them an unfair advantage—a condition the bankruptcy act intended to provide against. We adopt the view that this provision of the act, properly construed, applies to both voluntary and involuntary cases, and that the learned trial court erred in ordering judgment against the garnishee for the indebtedness owing from it to defendant. The garnishment proceedings were, as a matter of law, rendered null and void by the judgment of the United States court adjudging defendant a bankrupt, and the effect and operation of the law was not changed by the failure of the defendant, in his schedule of assets, to disclose the fact that the indebtedness had been garnished. The indebtedness to him was disclosed, and he asserted a claim of exemption thereto under the statutes of Iowa.

2. The second question presented is whether the court below erred in denying the motion perpetually to enjoin fur-

ther proceedings on the judgment, or vacate it for the purpose of enabling defendant to answer and defend in the action. As heretofore stated, the action was commenced before defendant filed his petition in bankruptcy, within the period of four months from that time, but the judgment was rendered against him subsequently, and long before he obtained his discharge. He, therefore, was in no position, and had no opportunity, to set up his discharge in defense, and the record before us discloses that he applied to the court below to obtain the benefits thereof within a reasonable time after he secured it. The discharge was issued to him on March 9, 1904, and, from the 24th of that month until the final hearing on the motion here under review he was before the court below at different times, on various motions seeking to effectuate his discharge. A discharge in bankruptcy releases the bankrupt from all liability for debts existing at the time he was adjudged a bankrupt, [509] except certain classes of debts, to which the debt here in question does not belong—a result of which the bankrupt cannot rightly be deprived. If an action be brought against him upon a claim existing at the time he was adjudged a bankrupt, his discharge, properly pleaded, is a complete defense, and it should not be in the power of a creditor to nullify the objects, purposes, and results of proceedings under the bankruptcy act by causing judgment to be entered before the bankrupt receives his final discharge. The debt here under consideration existed at the time defendant filed his petition in bankruptcy, was provable in the bankruptcy court, and its character was in no way changed by the entry of the judgment. It remained the same debt, changed only in form.

It is true that defendant could not have obtained from the court below a stay of proceedings, in the action in which the judgment was rendered, pending the administration of his estate in the bankruptcy court, but his failure in this respect is not fatal to his right to insist that effect be given to his discharge, nor does it matter that he made a general appearance in that action before or after the entry of the judgment; his release is just as effectual.

This precise question has been before the courts of other states and before the supreme court of the United States under the old bankruptcy act, which, in the respects here under consideration, was the same as the present act, and relief was

awarded to the bankrupt similar to that here applied for. In Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. Rep. 981, 30 L. ed. 985, the court had before it a case substantially like that at bar, and it was held that the judgment entered against the bankrupt after he was adjudged a bankrupt, and before his discharge, was canceled and annulled by the final discharge. It was so held in Huntington v. Saunders, 166 Mass. 92, 43 N. E. 1035; Sanderson v. Daily, 83 N. C. 67; Blair v. Carter, 78 Va. 621. It has also been held by many of the authorities that in such cases the bankrupt may have from the court rendering the judgment an order perpetually staying execution on the judgment, even though no stay of proceedings in the action was obtained pending the proceedings in the bankruptcy court: Palmer v. Hussey, 119 U. S. 96, 7 Sup. Ct. Rep. 158, 30 L. ed. 362; Palmer v. Hussey, 87 N. Y. 303; Smith v. Kinney, 6 Neb. 447; Leonard v. Yohnk, 68 Wis. 587, 60 Am. Rep. 884, 32 N. W. 702.

The rule laid down in these cases harmonizes with the purpose of the bankruptcy act, and gives force and effect to the discharge of the [510] bankrupt, and we apply it in the case before us. It follows that the learned court below erred in refusing a perpetual stay of execution upon the judgment, there being no question but that defendant was by his discharge released from liability for the debt upon which it was founded.

It is unnecessary to consider whether the indebtedness due from the garnishee was exempt to defendant under the statutes of the state of Iowa; that is not a controlling question. Whether exempt or not, plaintiff has no legal or valid claim against it. The garnishment by which it was held was dissolved when defendant was adjudged a bankrupt, and he was released from liability to plaintiff for the indebtedness due him by his final bankruptcy discharge, so that plaintiff has neither the garnishment nor a claim against defendant upon which to base a right to contest the asserted exemption.

Order reversed.

A Discharge in Bankruptcy is a bar to a judgment entered after the commencement of the bankruptcy proceedings, upon a claim provable in such proceedings: Emery, Appellant, 89 Me. 544, 56 Am. St. Rep. 440; Lacheimer v. Stewart, 91 Tenn. 385, 30 Am. St. Rep. 887. The judgment will be stayed on the application of the debtor upon his producing the discharge: Lackey v. Steere, 121 Ill. 598, 2 Am. St. Rep. 135. As to the effect of a discharge in bankruptcy on pending proceedings in garnishment, see Marx v. Hart, 166 Mo. 503, 89 Am. St. Rep. 715.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

HOVORKA v. HAVLIK.

[68 Neb. 14, 93 N. W. 990.]

HUSBAND AND WIFE—Transfers from Her to Him.—The Burden is upon the Husband to show that a gratuitous transfer to him from his wife was made freely, and that the transaction was fair and proper. (p. 389.)

HUSBAND AND WIFE.—A Transfer Made by a Wife to Her Husband Because of Threats made against her by him that he would leave her, and because of threats against her children, is void. (p. 389.)

REAL ESTATE, Contracts for the Purchase and Sale of by Administrators.—The interest of the estate of a decedent in an executory contract for the purchase of lands cannot be sold by the administrator except as real estate, and after an order of court authorizing him to make the sale. (p. 391.)

HUSBAND AND WIFE, Prescriptive Title of the One Against the Other.—Where a husband and wife live together on the same real property, he has no greater possession than she, and cannot acquire title by prescription against her. (p. 392.)

DURESS, Avoiding Deed Procured by.—If a deed is procured by duress, it may be avoided by entry by the grantor or his heirs within the statutory period of limitation. (p. 392.)

Archibald S. Sands, Leonard W. Colby and E. S. Abbott, for the plaintiffs in error.

Fayette I. Foss, Bert Kohout, R. D. Brown and William C. Hastings, for the defendants in error.

[15] DUFFIE, C. At the date of his death—the date of which does not clearly appear in the record—John Havlik resided on a homestead claim consisting of the northwest quarter of section 15, township 8, range 4 east of the sixth P. M., in Saline county, Nebraska. He also held a contract from the state of Nebraska for the purchase of twenty acres of school

land, being the east half of the southeast quarter of the northeast quarter of section 16, township 8 north, of range 4 east of the sixth P. M. He left surviving him a widow and three children, one of whom is the defendant herein. After his death his widow proved up on the homestead claim, and a patent for the land was duly issued to her under the provisions of section 2291 of the Revised Statutes of the United States. Some time after the decease of John Havlik his widow married one Frank David, and on July 3, 1884, she made a deed of the northwest quarter of section 15 to one Frank Nedela, and on the same day Frank Nedela conveyed said premises to Frank David. There is evidence in the record that these deeds were made on the agreement that David should pay eight hundred dollars to each of the three children of John Havlik, and twelve hundred dollars to the wife in case they should not continue to live together. Prior to this time the widow of John Havlik (then Mrs. David) assigned the school land contract held by her deceased husband to Frank David, and on March 22, 1879, he procured a patent from the state for the land therein described. Frank David departed this life on the twenty-third day of April, 1891, and at the date of his death held the legal title to the homestead quarter section and to the twenty [16] acres of school land above described. After his death Mrs. David continued to reside upon the homestead until her death, which occurred August 13, 1891. She left a will by which she devised all her real and personal property to John Havlik, a son by her first husband, the homestead and school land being specifically described in her will as the real property conveyed thereby. Since the death of his mother, John Havlik has been in possession of the above-described property, claiming title thereto under his mother's will; and some time in the year 1900 this action was commenced by a part of the heirs of Frank David and the grantees of the other of those heirs to recover possession of said lands. A verdict was returned for the defendants, and the plaintiffs have brought error to this court. The defense interposed was that Frank David had procured title to the homestead property from his wife by coercion and duress, and that her assignment of the school-land contract, being made without a license from the court, was void.

The seventh and eighth instructions of the court were excepted to by the plaintiffs in error, who now insist that they were erroneous. They are as follows:

"7. If you find from the evidence, gentlemen, that Frank David, deceased, became the husband of Mary David, and while living with her as her husband she at his request conveyed the northwest quarter of section 15 to Frank Nedela, who, by previous arrangement and without any consideration paid by said Frank David, conveyed said quarter section to Frank David, such transaction will be presumed fraudulent and void and to have been made by said Mary David under duress by her husband and against her will unless it appears from the evidence that the transaction was fair and just and understood by Mary David and entered into by her voluntarily.

"8. If you find, gentlemen, that the deed of Mary David to Frank Nedela, bearing date of July 3, 1884, which has been shown here in evidence, was made by her because of threats made against her by her husband, and [17] because of threats on his part to leave her, and of threats against her children, and was without consideration on the part of the said David, but was made solely for his benefit, then such deed is void as against the said Mary David, and neither Frank David nor anyone claiming through him can base any claim of title thereon."

The law is well settled that the burden is upon the husband to show that a gratuitous transfer to him from his wife was made freely, and that the transaction was fair and proper: Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Wales v. Newbould, 9 Mich. 45; Penniman v. Perce, 9 Mich. 509; Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Boyd v. De La Montagnie, 73 N. Y. 498, 29 Am. Rep. 197.

The jury was told in the seventh instruction that if the conveyance to David was without consideration, the presumption obtained that it was void; while the eighth instruction informed the jury that if the transfer to David was induced by threats made against Mary David and her children, and without consideration, then the conveyance so obtained was void. As we have seen, the seventh instruction announced a well-established rule placing the burden on the husband, or those claiming through him, to show that a gratuitous transfer from his wife was made freely and without any compulsion; that the transaction was a fair one, and while there is evidence in the record tending to show that David did pay a consideration for the conveyance to him, still this was a question for the jury to determine, and one which was properly submitted for its determination. The eighth instruction was more fav-

orable to the plaintiffs in error than authorized by legal rules, in requiring a want of consideration for the transfer, in addition to duress in obtaining it, to avoid the conveyance. No one can be required to part with his property against his will, and no consideration, however great or valuable, will validate a deed obtained by coercion and duress. The plaintiffs in error have no cause to complain of these instructions.

Complaint is also made of the ninth instruction, given [18] as follows: "You are further instructed, gentlemen, that under the laws of the state of Nebraska when one dies possessed of a contract for the purchase of land, his interest in such land under said contract may be sold in the same manner as if he had died seised of the land itself, and in no other way." It is insisted that a contract for the purchase of school lands from the state is personal property, the title to which passes to the administrator, and that he has the right to sell it the same as other personal property of the deceased. It is said that at common law the executor or administrator has an absolute power of disposition of the personal estate of deceased, by sale or otherwise as he sees fit; and that while the statutes of this state provide for an application by an administrator to the probate court for a license to sell personal property of an estate, the statutory provisions are not exclusive, and the administrator may still sell without an order of the probate court making himself and his bondsmen liable for the value of the property if the sale is for less than its true value. We might admit the correctness of this claim so far as it relates to personal property pure and simple, but as a decision of the case does not, in our opinion, depend upon whether the administrator may sell and pass good title to such property without a license from the court, we refrain from expressing an opinion on the question. Sections 94 and 95 of chapter 23 of our statute (Annotated Statutes, 4968, 4969) provide:

"Sec. 94. If a deceased person, at the time of his death, was possessed of a contract for the purchase of land, his interest in such land and under such contract may be sold, on the application of his executor or administrator, in the same manner as if he had died seised of such land, and the same proceedings may be had for that purpose as are prescribed in this subdivision in respect to lands of which he died seised, except as hereinafter provided.

"Sec. 95. Such sale shall be made subject to all payments that may thereafter become due on such contracts, and if

there be any such payments thereafter to become [19] due, such sale shall not be confirmed by the judge of the district court until the purchaser shall execute a bond to the executor or administrator for the benefit and indemnity of the person entitled to the interest of the deceased in the land so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the judge of the district court shall approve."

This statute, as we understand, was borrowed from the state of Michigan, and had as early as 1863 received a construction by the supreme court of that state, by which it was held that "under our probate system, an administrator cannot sell the interest of the estate in an executory contract for the purchase of lands, except as real estate and after license": Baxter v. Robinson, 11 Mich. 520. But even in the absence of this statute and of its construction by the supreme court of Michigan, we cannot believe that it was the intention of the legislature that valuable landed estates, held by the decedent under a contract of purchase, should pass to the administrator, to be disposed of by him in the same manner as the goods and chattels coming to his possession. There are numerous cases where valuable farms and other property are held under a contract of purchase. The decedent and his family may have lived upon the property for years; the purchase price may have been mostly paid; and it would be so unusual and unjust to allow the administrator to claim title to this property, and a right to dispose of it as personalty coming to his hands without a showing that it was necessary in the settlement of the estate, that a statute authorizing such a procedure should be the only authority of this court to declare it to be the law.

The plaintiffs in error requested an instruction to the effect that Frank David's title to the school land was based upon the deed from the state of Nebraska, which deed was based upon an assignment of a sale contract issued by the state to Havlik, deceased, and assigned by his administratrix to said David, and that if the jury found [20] that David entered into the exclusive, open, notorious and adverse possession of said premises under said deed, and retained and occupied the same for ten years or more continuously thereafter, that it was then wholly immaterial as to the form or manner of making an execution of the assignment or the existence of the same, and that such continued possession would establish

a legal and sufficient title in the deceased. The refusal of this instruction is assigned as error. We do not think that under the circumstances error can be predicated upon the refusal of the court to give this instruction. The evidence is undisputed that the possession of this school land by Frank David was a joint possession with his wife. He had no greater possession than did she, and we do not think that where the husband and wife reside together, and are jointly in possession, one can acquire title as against the other by prescription.

The claim that the defendant's right to assert title to the homestead tract is barred by the statute cannot be sustained. The deed to David was made in 1884. He died in 1891. Even if his possession had been exclusive, the statutory period of ten years had not expired at his death. Mrs. David attempted to convey this land by her will, made after the death of David; and John Havlik, the defendant, took possession under his claim as devisee on the death of his mother—all in 1891. If the deed to David was obtained by duress, it may be avoided by the entry by the grantor or her heirs within the statutory period: Inhabitants of Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155. The evidence in this case satisfies us, as it did the jury, that the transfer of title from Mrs. David to her husband was made under coercion and duress. The evidence of any consideration having been paid is not of the most satisfactory character, and while we would not be inclined to interfere with a finding of the jury that a consideration was paid, we are entirely satisfied with the verdict returned, which, under the instructions, must have been based on a finding that David paid nothing for the [21] conveyance made to him, or that such conveyance was coerced from his wife, or both. We find no error in the record of which the plaintiffs in error can complain. We are satisfied with the verdict of the jury, and recommend an affirmance of the judgment.

Ames and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Where a Woman Makes a Gratuitous Transfer of real estate to her husband, it must be made to appear, in order to sustain the conveyance that she acted freely and deliberately: Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Boyd v. De La Montagnie, 73 N. Y. 498, 29 Am. Rep. 197.

Husband and Wife cannot Hold Adversely to each other while residing together on the same tract of land: Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38.

An Executor has no Power to dispose of lands by virtue of his office: Frost v. Atwood, 73 Mich. 67, 16 Am. St. Rep. 560; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232. See, generally, on the common-law powers of executors, the monographic note to Fletcher v. American Trust etc. Co., 78 Am. St. Rep. 171-207.

SEIVER v. UNION PACIFIC RAILROAD COMPANY.

[68 Neb. 91, 93 N. W. 943.]

EXEMPTION OF WAGES, Injunction to Protect.—If a judgment creditor sues out successive garnishments against the wages of his debtor, which are clearly exempt from execution, a suit in equity may be maintained to enjoin further proceedings in the garnishment and to prevent the paying of such wages to any person except the judgment debtor. (p. 396.)

JURISDICTION Where There are Two or More Defendants.—The defendant who may be sued in the county where the action is brought must be a necessary and not a sham defendant joined solely for the purpose of bringing in the defendants served in another county. (p. 396.)

JURISDICTION to Issue Summons to Another County.—The true test to determine whether or not the venue is proper, so that the summons may issue to another county, is whether the defendant served in the county where the suit is brought is a bona fide defendant to the action—whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendant, and in equity actions may be added the inquiry whether or not plaintiff can obtain full, suitable, and satisfactory relief without joining such party, and binding him by the terms of the judgment and decree. (p. 397.)

PARTIES DEFENDANT in Suit for Injunction.—In a suit to enjoin further proceedings for the garnishment of exempt wages of a judgment debtor due him from his employer, a railway corporation, and to prevent the payment of such wages to any person except himself, such corporation is a proper party defendant. (p. 399.)

W. J. Courtwright and S. S. Sidner, for the appellants.

H. Z Wedgwood, John N. Baldwin and Edson Rich, for the appellees.

92 BARNES, C. This was a suit in equity, in which George W. Seiver was plaintiff and the Union Pacific Railroad Company, George Miltonburger and Walter Miltonburger were defendants. The trial resulted in a decree enjoining the Miltonburgers from suing out or prosecuting any further or other proceedings in garnishment against the said Seiver, and at the

same time the Union Pacific Railroad Company was restrained and enjoined from answering any such further or other proceedings, and from paying the wages which it owed to Seiver into court thereon, or anyone except him, on the ground that such wages were absolutely exempt to him from execution or proceedings in garnishment. From that decree the Miltonburgers bring the case here on appeal.

93 It appears that the appellants obtained a judgment before a justice of the peace at North Bend, in Dodge county, Nebraska, against the appellee and another, on a claim for damages caused by the breaking of a buggy; that appellee was a married man, the head of a family and resided at Papillion, Sarpy county, Nebraska, and was employed by the Union Pacific Railroad Company as its station agent at that place when the action was commenced; that appellants resided in Dodge county, and that they sued out garnishment proceedings against the appellee before the justice of the peace in that county and served the writ, or notice, on the Union Pacific Railroad Company, requiring it to answer in said court and pay over the wages due appellee, if any, in satisfaction of the judgment; that appellee employed an attorney, who went to Dodge county and successfully defended against the proceedings, and the garnishee was discharged; that within a month thereafter the Union Pacific Railroad Company was again served with garnishee process, and appellee was again required to and did employ an attorney to go to North Bend and defend against the proceedings, in order to save his exempt wages for the support of his family; that, on the appearance of appellee's attorney therein, the second proceeding was dismissed for want of prosecution; that within thirty days thereafter a third writ in garnishment was sued out by appellants and served on the Union Pacific Railroad Company, and said company then notified appellee that something must be done, or it would be necessary for it to, and that it would, pay over the wages then due him into court. In order to protect his right to the said wages, which were absolutely exempt to him, and to prevent a further multiplicity of suits and save himself from further trouble, annoyance and expense, appellee commenced this action in the district court of Sarpy county, where he resided, against the Union Pacific Railroad Company and the appellants, setting up the foregoing facts in his petition and praying for the relief which was decreed to him as aforesaid. The company was duly served

with a summons [94] in Sarpy county and thereupon a summons was issued to the sheriff of Dodge county and was served on the appellants. The railroad company defaulted, and thus, on its part, confessed all of the allegations of the petition to be true. Appellants appeared specially and objected to the jurisdiction of the court, for the reason that the railroad company was only a nominal party, was improperly joined with them as a defendant in the suit, and that therefore the court obtained no jurisdiction over them. The same objection to the jurisdiction of the court was pleaded in their answers, and, while the court did not specially rule thereon, still the objection was in effect overruled by retaining the action for trial, in trying the same and rendering its decree for the appellee herein. On the trial the appellee introduced his evidence, the Union Pacific Railroad Company by its default confessed the allegations of the petition as to it to be true, and the court so found, while the appellants introduced no evidence to contradict the allegations of the petition or rebut the evidence introduced by the appellee. Therefore the sole question for our consideration is one of jurisdiction.

It must be conceded that the decree, so far as the railroad company is concerned, is a proper one, and if the court had jurisdiction of the persons of the appellants, then the judgment is just and equitable as to them and must be affirmed. The facts pleaded and approved by the appellee surely call for the interposition of a court of equity, and demand the relief prayed for. It cannot be successfully asserted that the appellee had an adequate remedy at law in this case. The court found that his wages, sought to be subjected by the proceedings complained of to the payment of the judgment, were absolutely exempt to him by law. The appellants knew this as well as he did, and yet, by a series of garnishment proceedings, amounting to a persecution in this case, they sought to compel him to pay the judgment out of such exempt money, or expend it all in protecting his legal right thereto. Not only this, but they evidently sought to annoy and harass [95] his employer until he must pay, or perhaps lose his employment. Again, it may be fairly assumed that by suing out a number of writs of garnishment appellee would at some time be unable to protect his rights, or the company would inadvertently default, and an order would thereupon be obtained which would result in compelling it to pay the money into court, leaving it still liable to pay the wages to appellee,

or perhaps altogether deprive him thereof. Against such iniquitous proceedings there is no adequate remedy at law, and such practices should receive our severest condemnation. When the property of a debtor is exempt, he is entitled to the possession of it, and should be protected in this possession in the most expedient manner: Cunningham v. Conway, 25 Neb. 615, 41 N. W. 452; Johnson v. Hahn, 4 Neb. 139. Appellee was entitled to the decree to save him from being harassed by a multiplicity of suits: Johnson v. Hahn, 4 Neb. 139; Uhl v. May, 5 Neb. 157; Normand v. Otoe County, 8 Neb. 18; Touzalin v. City of Omaha, 25 Neb. 817, 41 N. W. 796; Schock v. Falls City, 31 Neb. 599, 48 N. W. 468; Morris v. Merrell, 44 Neb. 423, 62 N. W. 865.

This brings us to the consideration of the question of jurisdiction. Section 65 of our Code of Civil Procedure provides that: "Where the action is rightly brought in any county, according to the provisions of title 4, a summons shall be issued to any other county, against any one or more of the defendants, at plaintiff's request." Title 4 (sections 51-61b), after designating the actions which must be brought in a certain specified county, provides that every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned; and it is further provided in said title that a railroad company may be served with summons in any county into or through which its line of road passes. It follows that the Union Pacific Railroad Company was properly sued and served with summons in Sarpy county, and if it was properly made a defendant in the action, the issuance of a summons to the sheriff of 96 Dodge county, and its service therein on appellants, gave the court full and complete jurisdiction over them. If, on the other hand, the railroad was not a necessary, or at least a proper, party, there was what would amount to a collusive joinder, and the court was without jurisdiction of the appellants. It is well established that the defendant, who may be sued in the county where the action is brought, must be a necessary, and not a sham defendant, joined solely for the purpose of bringing in the defendants served in another county: Dunn v. Haines, 17 Neb. 560, 23 N. W. 501; Cobbey v. Wright, 23 Neb. 250, 36 N. W. 505, 29 Neb. 274, 45 N. W. 460; Hanna v. Emerson, 45 Neb. 708, 64 N. W. 229; Miller v. Meeker, 54 Neb. 452, 74 N. W. 962; Stewart v. Rosengren, 66 Neb. 445, 92 S. W. 586.

The true test, however, for determining whether or not the venue is proper so that summons may issue to another county is whether the defendant served in the county where the suit is brought is a bona fide defendant to that action—whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendant, and in equity actions may be added the inquiry as to whether or not plaintiff can obtain full, suitable and satisfactory relief without joining such party, and binding him by the terms of the judgment or decree.

Equitable doctrines with respect to parties and judgments are wholly unlike those which prevail at common law—different in their fundamental conceptions, in their practical operation, in their adaptability to circumstances and in their results upon the rights and duties of litigants. The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the right and duties of all the parties which really grow out of or are connected with, the subject matter of that suit. The primary object is that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed and all [97] may be bound in respect thereto by the single decree: Pomeroy's Equity Jurisprudence, sec. 114.

Speaking of the question of parties in actions to prevent a multiplicity of suits, Pomeroy says: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject matter,' among these individuals, but where there is and because there is merely a community of interest among them in the question of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each in-

dividual member of the numerous body." Further speaking of the objection raised to this doctrine, Pomeroy says: "The sole and sufficient answer to the objection is found in the actual facts. The jurisdiction has been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue, and perhaps in the kind of relief, and the single decree has without any difficulty settled the entire controversy and determined the separate rights and obligations of each individual claimant. The same principle, therefore, embraces both the technical 'bills of peace,' in which there is confessedly a common right or title, or community of interest in the subject matter, and also those analogous cases over which the jurisdiction has been extended, in which there is no such common right or title or community of interest in the subject matter, but only a community of interest in the question involved and the kind of relief obtained": Pomeroy's Equity Jurisprudence, sec. 269.

98 It cannot be said that the railroad company and appellants were not mutually interested in the questions involved in this case, and in the effect of the relief granted by the decree. Again, garnishment proceedings had been already commenced for the third time, notice had been served on the railroad company requiring it to answer and pay the money into court; therefore a decree against the appellants alone would not have been binding on the company; it could still answer and pay over the money into court to the irreparable injury of the appellee. In any event, it was holding back the money due to him, and it was necessary to make the company a party and by the decree release the fund and require it to be paid to the owner thereof. It would thus appear that the railroad company was a proper party, and it may be further stated that it was a necessary party in order to enable appellee to obtain suitable and complete relief in the case at bar. A decree restraining the appellants from prosecuting further proceedings to subject appellee's exempt wages to the payment of their claim would not have been effective, for the reason that a transfer of their claim to another would have enabled such other person to still proceed with further illegal attempts to obtain the money. Again, although enjoined from prosecuting further in the courts of this state, they might transfer their claim to Iowa, where the Union Pacific Railroad Com-

pany has a part of its line and maintains some of its offices. The exemption laws of this state have no extraterritorial force, and it has been the universal policy of the courts of Iowa to disregard the exemption laws of other states. So that without a decree enjoining the Union Pacific Railroad Company from paying over the money in satisfaction of the appellants' claim, it would be required to answer proceedings instituted in Iowa and pay the money into court there, thus depriving the appellee of the wages which are absolutely exempt to him by the laws of this state. Notwithstanding we have a law prohibiting such transactions, yet it has in many cases failed to prevent parties from unlawfully collecting [99] their claims in that manner. A decree, however, against the railroad company, enjoining it from paying the money into any court, or upon any proceedings, wherever instituted, could be pleaded in bar to such proceedings with binding effect.

So we are constrained to hold that the Union Pacific Railroad Company was not only a proper but a necessary party in the suit; that the action having been properly commenced against it in Sarpy county, and it having been served with summons therein, the issuance of summons to the sheriff of Dodge county and the proper service thereof on the appellants gave the court full and complete jurisdiction to hear and determine the questions involved in the action and render a suitable and proper decree therein.

We further hold that according to the facts disclosed by the record, the decree of the district court was right, and we recommend that it be affirmed.

Oldham and Pound, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

Injunctions against the forced sale of exempt property are discussed in Smith v. Gufford, 36 Fla. 481, 51 Am. St. Rep. 37; Parsons v. Hartman, 25 Or. 547, 42 Am. St. Rep. 803; Driggs' Bank v. Norwood, 49 Ark. 136, 4 Am. St. Rep. 30. An injunction will lie, in a proper case, to prevent vexatious litigation and multiplicity of suits: Mills v. New Orleans Seed Co., 65 Miss. 391, 7 Am. St. Rep. 671. A city, for example, may be restrained from maintaining a multiplicity of prosecutions under an invalid ordinance: South Covington etc. Ry. Co. v. Berry, 93 Ky. 43, 40 Am. St. Rep. 161.

VILA v. GRAND ISLAND ELECTRIC LIGHT, ICE AND COLD STORAGE COMPANY.

[68 Neb. 222, 94 N. W. 136, 97 N. W. 613.]

RECEIVER, Appointment of, When not Authorized.—A Suit cannot be Maintained Solely for the Appointment of a Receiver. Receivership is purely an ancillary remedy. (pp. 404, 414.)

RECEIVER, Suit, When not Commenced and Pending so as to Authorize the Appointment of.—A receiver can be appointed only in a suit actually commenced and pending, and it is not commenced and pending, though a complaint or petition, together with an answer, is filed, if neither contains a statement of facts authorizing the appointment of a receiver or the maintenance of an action for any other purpose. (p. 404.)

RECEIVER FOR CORPORATION.—A court has no power to appoint a receiver for corporate property upon grounds which would not authorize such appointment if the defendant were a natural person. (p. 406.)

RECEIVER, Property of Which may be Authorized to Take Possession.—On a petition by a mortgagor for the appointment of a receiver, with a prayer that he be authorized to take possession of the property covered by the mortgage, an order authorizing him to take possession of all other property belonging to the defendant is unauthorized and void. (p. 407.)

RECEIVER, Consent of Corporation to Appointment of.—The appointment of a receiver of a corporation, though consented to by it, is void if the pleadings state no ground for such appointment. (p. 409.)

PLEADING, Complaint, Sufficiency of, When may be Questioned.—The question of the sufficiency of the petition, and whether it states a cause of action, may be raised at any stage of the proceedings, even in the supreme court on appeal, and is open for consideration in the appellate court at any time until and including the filing of a motion for a rehearing. (p. 412.)

PLEADING, Defects in Complaint, Parties not Estopped from Urging.—If a complaint for the appointment of a receiver does not state a cause of action, nor warrant the granting of any equitable relief, the participation of interveners and others in the proceedings had in the trial court cannot preclude them from urging the insufficiency of such complaint on appeal to support the orders, judgments and decrees of the trial court. (p. 413.)

PLEADING—Complaint, Prayer of cannot Supply Defects in. Though the prayer of a petition contains a request for general equitable relief, it cannot be extended so as to warrant the granting of relief not embraced within and comprehended by the allegations of the pleading. (p. 413.)

RECEIVERS.—The Appointment of a Receiver is not Justified Unless it affirmatively appears that there is a reasonable possibility that the plaintiff will ultimately succeed in obtaining relief in the suit in which the receivership is asked. (pp. 415, 416.)

CORPORATIONS, Receivers of.—A court of equity will not appoint a receiver for the purpose of seizing the property of a corporation and winding up its affairs without statutory authority and without the case being brought within the equitable principles sanctioned and taken cognizance of by courts of chancery in England. (p. 417.)

CORPORATIONS, Receiver of, Mortgagee, When not Entitled to.—A mortgagee of corporate property is not, because of anticipated default in the indebtedness, a possible inability to continue much longer the business conducted by it, threatened attachments, financial weakness or insolvency, and, in the event of the suspension of business, a consequent depreciation in the value of the mortgaged property, entitled to have a receiver appointed, the corporate property sequestered, the business conducted by a receiver until, by a receiver's sale, the estate may be sold subject to the mortgage indebtedness and the affairs of the corporation terminated. (p. 418.)

Charles G. Ryan, Richard C. Glanville and Leo Cleary, for the appellants.

William H. Thompson and Virgil O. Strickler, contra.

[222] LOBINGIER, C. On December 6, 1900, appellees filed in the district court for Hall county a petition making the Grand Island Electric Light, Ice and Cold Storage Company, a defendant, alleging that it had, on June 18th, previous, mortgaged its plant and other property to appellee Vila for fifteen thousand dollars; that four thousand dollars of this had been used for other purposes than paying off a prior mortgage as agreed; "that said defendant [223] is now and will be wholly unable to pay the interest or any part thereof to become due on its said mortgage indebtedness on January 1, 1901; that defendant is also wholly without ability or means to pay any part of its floating indebtedness amounting to about the sum of eighty-six hundred and sixty-two dollars ($8,662) and its creditors are threatening to attach the mortgaged property hereinbefore described"; that defendant had failed to keep its plant in repair as required by the mortgage; and that by the terms of the mortgage the noncompliance with its covenants entitled plaintiff to an appointment of a receiver. Another clause of the mortgage quoted in the petition authorizes such appointment "upon the commencement of suit to foreclose," and the petition contained the following prayer: "Wherefore the plaintiffs pray that a receiver be appointed for defendant and the said receiver be given authority to do each and all of the things mentioned in said mortgage, to wit: To take possession of all the defendant's property covered by said mortgage and to manage and operate the business and to collect its income and profits, and to apply the same upon the expenses and charges for maintaining and operating said business and paying the obligations secured by

plaintiffs' mortgage and for such other and further relief as to the court may seem meet and proper."

On the next day the following answer was filed on behalf of the defendant: "Now comes the above-named defendant and for answer to the plaintiff's petition admits the facts therein stated and consents to the appointment of a receiver in this action as prayed in the plaintiffs' petition."

On the same day a receiver was appointed to take charge of the "property, business and assets of the defendant [part of which is enumerated], and all other property of every kind or character, belonging to or pertaining to said defendant and its business." By the terms of this order the receiver is directed, inter alia, "to operate and carry on the business of the defendant." The next order appearing [224] in the record is dated March 5, 1901, and recites "that it is for the best interest of the parties hereto, of the said trust and all persons interested therein that the business of the said defendant, the Grand Island Electric Light, Ice and Cold Storage Company be speedily closed and the affairs thereof wound up as soon as possible." In this order also the receiver is directed to notify all creditors of the defendant to file their claims. It does not appear in the record upon what this order is based or at whose instance it was obtained. On March 25th, the several appellants filed individual petitions of intervention, alleging the recovery of judgments before a justice of the peace on claims for labor performed in defendant's behalf. The aggregate amount of these claims was about seven hundred dollars, and each petitioner prayed that his claim should be given preference, and alleged that the property in the hands of the receiver included about nine thousand dollars' worth of personalty which was not covered by plaintiffs' mortgage, and each prayed that he might share in the fund arising from the sale thereof. An order granting leave to intervene as prayed was entered on the same day that these petitions were filed, and on the following day the receiver filed a report as to the condition of the business, in which he recommended a speedy sale of the entire property in his hands. Objections to this application to sell were filed by the interveners, and also by appellee Kinkel, a stockholder in the defendant corporation. These were overruled, and an order made requiring an inventory

and appraisement of the property, in pursuance of which the appraisers fixed the valuation of the plant in the aggregate at twenty-five thousand dollars. On May 6th, a decree was rendered, in which demurrers to the several petitions of intervention were sustained, but the claims of the interveners, among others, were allowed, less the court costs of placing them in judgment. By this decree, the court also found that certain of the property in the receiver's hands was personalty and was not covered by plaintiff's mortgage, but it also found "that all of the property, goods and franchises, real, personal or mixed, [225] coming into the hands of the said receiver, save that which is herein specifically found to be personal property, is covered by the said plaintiff's mortgage." The decree directed a sale, subject to the mortgage, of all property covered thereby, and a separate sale of the remaining personalty, and on June 8th the entire property was sold to G. H. Payne, trustee, president of appellee Payne-Knox company, for two thousand eight hundred dollars for the mortgaged property and one hundred and fifty dollars for the balance. This is about one-third of the floating debt alleged, as we have seen, to exist at the beginning of the suit. Objections to confirmation of the sale were filed by interveners, they having previously objected to the appraisement, but these were overruled and the sale confirmed on June 22d. Interveners bring the cause here by appeal, attacking both the decree of May 6th, directing a sale, and also the order of June 22d, confirming the same. These orders are both made a part of the transcript which was filed here October 11th, and a review of them brings before us also the question as to the validity of the order appointing the receiver (Seeds Dry-Plate Co. v. Heyl Photo-Supply Co., 57 Neb. 214, 77 N. W. 660), for if this was invalid the subsequent proceedings, being based thereon, are necessarily so.

Appellants contend that there was no "suit actually commenced and pending" as required by section 267 of the Code before a receiver may be appointed. This requirement is jurisdictional. "The order appointing a receiver was void, for the reason that it was made when there was no suit pending": Cooley, J., in Merchants' etc. Nat. Bank of Detroit v. Kent, Circuit Judge, 43 Mich. 292, 296, 5 N. W. 627.

"No authority is given by the statutes of this state to its courts, or to judges thereof in vacation, to make such an appointment, except in a pending suit, nor does it inhere in any of them under their general jurisdiction as courts of equity": State v. Ross, 122 Mo. 435, 26 S. W. 497, 23 L. R. A. 534; cf. In re Brant, 96 Fed. 257, where the authorities are collated.

Moreover, the suit which must be "actually commenced [226] and pending" as a condition precedent to an appointment of a receiver, must be one in which the main relief sought is independent of the receivership. The latter is a purely ancillary remedy.

"It is not the office of the court of equity to appoint receivers as a mode of granting ultimate relief. They are appointed as a measure ancillary to the enforcement of some recognized equitable right": Baldwin, J., in Barber v. International Company of Mexico, 73 Conn. 587, 593, 48 Atl. 758.

"Unless, possibly, in cases provided for by the statute, the appointment of a receiver can only be made in aid of the main action; although such appointment may be a part of the relief sought by the complaint": State v. Union Nat. Bank, 145 Ind. 537, 550, 57 Am. St. Rep. 209, 44 N. E. 585.

"The appointment is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding": State v. Ross, 122 Mo. 435, 456, 26 S. W. 497, 23 L. R. A. 534.

Tested by these authorities, we are unable to say there was "a suit actually commenced and pending" when the receiver in this case was appointed. It is true that a petition had been filed the day previous, but this would not constitute such a suit, unless it set forth grounds instituting an actual controversy and demanding substantial relief beyond the mere appointment of a receiver.

In State v. Ross, 122 Mo. 435, 26 S. W. 497, 23 L. R. A. 534, a corporation filed a petition alleging that its plant was heavily encumbered, and praying for the appointment of a receiver, with a prayer, as here, for general relief. A receiver was appointed, but upon application to the supreme court a writ of prohibition was granted, and the court said (page 457): "The filing of that petition no more instituted an actual controversy between contending suitors in court, than would the filing of a copy of the Lord's

Prayer. It laid no foundation whatever for the exercise of the jurisdiction of the court to appoint a receiver, unless some ground for the exercise of that jurisdiction can be found other than an actual, pending controversy in the court which undertook its exercise."

The petition in this case contains no prayer for specific 227 relief other than the appointment of a receiver. Some of its allegations, indeed, resemble those of an ordinary petition to foreclose a mortgage. But no such relief is asked, and, waiving the question whether a decree of foreclosure may be rendered under a prayer for general relief, we have searched this petition in vain for averments which declare plaintiff's right to a foreclosure. The mortgage itself is not attached to or made a part of the petition, and while some of its provisions are quoted, they are confined to such as show the holder's right to a receiver; they set forth no default which would entitle him to foreclose. The petition conclusively shows not only that the principal debt is not due, but that not even the first coupon had matured at the time the proceeding was begun. The petition merely alleges that the mortgagor will be unable to meet this when the coupon shall fall due—nearly a month later. Not even the appointment of a receiver will be made on anticipated grounds: Chadron Banking Co. v. Mahoney, 43 Neb. 214, 61 N. W. 594. Much less will a decree of foreclosure be rendered. And not only does the petition fail to state facts which authorize a foreclosure, but the conduct of plaintiff indicates that they never intended to seek such relief. No attempt has been made anywhere in the progress of the litigation to obtain a decree of foreclosure, and the defendant's property was finally purchased by the president of the corporate plaintiff under a decree which expressly directed the sale subject to and not by virtue of the mortgage.

Nor can this petition be upheld as one for the dissolution of the corporate defendant. It contains no prayer that the corporation be dissolved, but, on the contrary, asks that a receiver be appointed, and that he apply the income "for maintaining and operating said business." The idea of a dissolution does not appear to have been entertained until March 5th—three months after the filing of the petition when the order was made reciting that it was for the best

interests of the parties that the affairs of the corporation be wound up.

228 But even had the petition contained a specific prayer for dissolution, this would not have supplied a sufficient basis for the appointment of a receiver.

"A court of equity has no inherent power as such to appoint a receiver over an insolvent corporation": Smith on Receivers, 3d ed., sec. 288.

"The general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. And courts of equity will not, ordinarily, by virtue of their general equitable jurisdiction, or of their visitatorial powers over corporate bodies, sequestrate the effects of the corporation, or take the management of its affairs from the hands of its own officers and intrust it to the control of a receiver of the court, upon the application either of creditors or shareholders": High on Receivers, 3d ed., sec. 288.

Our legislature has enacted statutes which authorize the appointment of receivers for winding up the affairs of particular corporations, as in the case of banks, but none of these apply to such a corporation as the defendant below. This receivership must be sustained, if at all, by the general statutory provisions relating to the appointment of receivers or by the general rules of equity jurisdiction.

"In the absence of a statutory enlargement of equity jurisdiction, a receiver of a corporation will not be appointed unless the same relief would be given, when claimed in an action against an unincorporated association of natural persons": Barber v. International Company of Mexico, 73 Conn. 587, 593, 48 Atl. 758.

Our statute on this subject is similar to that of Iowa.

In Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 323, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122, it was observed: "We have heretofore held that this section does not authorize the dissolution of the corporation by a court of equity, nor the placing of its property in the hands of a receiver which practically accomplishes the same purpose."

229 We have not overlooked Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N. W. 46, but we find nothing there to change

our conclusions. It was an action by a stockholder to establish and foreclose a lien upon corporate property, and by the same order which granted him this relief a receiver was appointed on the ground that the majority stockholders were mismanaging the corporate business and misappropriating corporate property. It follows Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184, which was an action to foreclose a mortgage executed by the corporation. In both cases, therefore, the plaintiffs were seeking to enforce liens, and the receivership was not, as here, the sole apparent purpose of the proceeding. In both cases grounds for the appointment of a receiver existed independent of the fact that the defendant was a corporation.

But if we were permitted to overlook the fact that no main action was pending when this receiver was appointed, we would still be unable to uphold the order of appointment and the subsequent proceedings thereunder, because it resulted in the sequestration of property by the receiver to which, in no view of the case, was he entitled. The petition merely prayed that he be authorized to take possession of the "property covered by said mortgage," and this would have been the limit of his rightful possession even had the petition sought and set forth grounds for a foreclosure. But the order of appointment gave him possession of "all other property of every kind or character, belonging to or pertaining to said defendant and its business." There never was an application to extend the receivership to other property and this part of the order, at least, was void on its face. Plaintiffs were not entitled in any event to a receivership of property in which they had no definite interest: Smith v. Wells, 20 How. Pr. (N. Y.) 158.

The case at bar strongly resembles State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585, where a similar course was followed by the trial court, and upon appeal it was observed (page 551): "In the case before us, the plaintiff had [230] no judgment or other general lien against the defendant's property. His only lien was that of his chattel mortgage; and without a suit to foreclose that mortgage he had no right to a receiver even for the property covered by that mortgage. Still less was there a right to a receiver for property not covered by plaintiff's chattel mortgage. The rights of judgment creditors could not thus be cut out by one who had no judgment or other lien upon

the defendant's property. From any point of view, therefore, it must be apparent that the court had no jurisdiction to appoint a receiver in this case."

In the case at bar the trial court distinctly recognized that there was property in the hands of the receiver not included in the mortgage, for it directed a sale of this apart from the other. But upon what possible theory had plaintiff a right to seek or obtain the appointment of a receiver of this nonmortgaged property?

Moreover, while the court ordered a sale of some of the personalty without subjecting it to the mortgage, the record shows that other property of that class was not sold in this way, for the decree expressly recites, as we have seen, "that all of the property real, personal or mixed save that which is herein specifically found to be personal property, is covered by the said plaintiff's mortgage." How much personal property was thus included in the mortgage we have no means of knowing, for that instrument is exceedingly comprehensive in its terms and purports to include "all and every description of personal and mixed property."

But the decree plainly shows that some of the personal property was treated as covered by the mortgage, and sold subject thereto. And the result of this must necessarily have been to reduce the assets from which interveners might satisfy their claims.

We do not agree with counsel for appellants that the labor claims of interveners constitute a preferential lien on the assets of the corporation. For, as we interpret the rule in Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339, it [231] merely upholds the discretionary power of the court which appoints a receiver to impose as terms of the appointment the prior payment of such claims as these. The doctrine is more fully elaborated in Farmers' Loan etc. Co. v. Kansas City etc. R. Co., 53 Fed. 182. But while these interveners may have had no liens other than those afforded by their judgments, they were certainly entitled to share as general creditors in every dollar that could be realized from the corporate assets not clearly appropriated to some higher claim.

Now, this mortgage, though purporting to cover personalty, was never filed as a chattel mortgage and was, therefore, in respect to chattels, "void as against the cred-

itor of the mortgagor": Comp. Stats., c. 32, sec. 14 (Annotated Statutes, 5963). These interveners were judgment creditors, and therefore within the letter of the rule laid down by this court in Farmers' etc. Bank of York v. Anthony, 39 Neb. 343, 57 N. W. 1029. Whether it was necessary that their judgments should have antedated the mortgage, we do not here decide, for the record discloses that in any event the receiver took possession of and sold, by virtue of the decree complained of, property which confessedly was not covered by the mortgage.

We see no escape, then, from the conclusion that the order appointing this receiver was made without jurisdiction, and that the subsequent proceedings thereunder were invalid.

We are cited to Commonwealth Mutual Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 Am. St. Rep. 515, 83 N. W. 922, and Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. Rep. 739, 33 L. ed. 184, in support of the contention that appellant Kinkel, as a stockholder, was bound by the court's order as regards the defendant corporation. The cases referred to simply announce the rule that a stockholder is concluded by a decree compelling the enforcement of a corporate duty. But there was certainly no duty on the part of the corporate defendant below to consent to the appointment of a receiver. Nor was it or any other party bound by an order which the court had no jurisdiction to make. It is a familiar rule that consent never confers jurisdiction over [232] the subject matter. This applies in the case of receiverships as completely as elsewhere.

"Consent of the parties before the court will not avail to secure resort to the remedy in a case otherwise improper, or if the rights of other persons will be affected adversely or put in danger of violation": Beach on Receivers, sec. 150.

This case has some of the features of Merchants' etc. Nat. Bank of Detroit v. Kent, Circuit Judge, 43 Mich. 292, 5 N. W. 627, where Cooley, J., said (page 298): "We do not enlarge upon this aspect of the case, as it is not necessary here; but it must be manifest that the parties were creating a trust by means of the mortgage and of a consent order which could not stand the test of the law. It resembles very closely an attempt by circuitous methods to avoid a legal principle."

In this case the consent of those now complaining was never sought or obtained. Although the petition distinctly averred that there were creditors who "are threatening to attach," and although the statute expressly requires that notice of an application for a receiver shall be given "to all parties to be affected thereby" (Code Civ. Proc., sec. 267), none of the interveners now holding judgments against the corporate defendant were notified, or given an opportunity to be heard as to the order appointing the receiver.

Under these circumstances, the mere fact that they did not except to the order should not prevent a review of it here. And in any event these objections being jurisdictional, may be raised even in the appellate court for the first time: City of Lansing v. Chicago etc. R. Co., 85 Iowa, 215, 52 N. W. 195; Orcutt v. Hanson, 71 Iowa, 514, 32 N. W. 482.

There are other questions presented in appellants' brief, but as their solution is not necessary to a determination of the case, we will not further prolong the limits of this opinion. We recommend that the decree of May 6th, and the order of June 22d, confirming the sale, be reversed, and that the order appointing the receiver be vacated.

Hastings and Kirkpatrick, CC., concur.

[233] By the COURT. For the reasons stated in the foregoing opinion, the decree of May 6, 1901, and the order of confirmation of June 22, 1901, are reversed, and the order appointing the receiver is vacated.

A rehearing having been granted and had, the following additional opinion was filed:

[234] HOLCOMB, J. A rehearing having been granted, this cause has been submitted on oral arguments and printed briefs for further consideration. The opinion heretofore formulated, prepared by one of the commissioners, is found under the title of Vila v. Grand Island Electric Light etc. Storage Co. and others, as interveners (ante, p. 401). The case is there quite fully stated and a repetition will here be avoided as far as is consistent with a proper discussion of the subject in the present opinion. Gauged by the pleadings, and the proceedings had and done thereunder, the suit appears to have been instituted by a mortgagee of the plant and property of the defendant corporation for

the purpose of having its property sequestrated, and, through the aid of a receiver, its affairs wound up by a sale of the property and a division of the assets among those entitled thereto. The suit in its practical workings has many of the earmarks of a proceeding had under our statute for the appointment of a receiver and the winding up of the business of an insolvent banking corporation incorporated under the laws of this state. The plaintiffs, as trustee and cestui que trust, were the owners and holders of certain bonds executed and delivered by the defendant company, and secured by a mortgage on its plant, consisting of both real and personal property. The defendant company at the time of the institution of the suit filed its answer, admitting the truth of the allegations or the petition and consenting to the appointment of a receiver as therein prayed for. The essential averments of the petition which it seems advisable here to state for the purpose of the further discussion of the case are in substance as follows: That it was agreed by the defendant when the loan was made, evidenced by the bonds executed at the [235] time and described in the petition, that the proceeds should be used to pay off a prior mortgage, and the balance for the completion of the plant; that prior to the inception of the litigation, the plaintiff learned for the first time that a large proportion of the proceeds of the loan so made had been misappropriated and used for other purposes, and that the plant remained in an unfinished and incomplete condition; that the defendant was at the time, and would be, wholly unable to pay the interest or any part thereof thereafter and within a short time to become due on the mortgaged indebtedness, and was wholly without ability to pay any part of its floating indebtedness, amounting to a large sum, and that its creditors were threatening to attach the mortgaged property; that the defendant was entirely without credit, unable to purchase supplies needed in its business, was without money, and that its business was likely to be stopped either by attachment suits or because of its inability to procure the necessary materials and appliances; and that should the business be discontinued, the value of the property would be greatly diminished, the public put to great inconvenience and great financial loss ensue. The mortgage, it was averred, contained the following provisions: That the defendant agreed to keep all the buildings, machinery,

engines, etc., in good repair and condition, and that such agreement had not been kept; that the mortgage also provided that in case of default in the payment of the bonds or interest, or failure to comply with any of its terms, the trustee should thereupon become entitled to the appointment of a receiver to take possession of the property, manage and operate the business, collect the income and profits, apply the same on the expenses and charges for maintaining the plant and business, and paying the obligations secured by such mortgage. Wherefore it is prayed that a receiver be appointed and given authority to do each and all of the things mentioned in the mortgage, to wit, to take possession of the property covered by the mortgage and manage and operate the business, [236] collect its income and profits, and apply the same upon expenses and charges for maintaining and operating the business, and in paying the obligations secured by plaintiff's mortgage, and for such other and further relief as to the court may seem meet and proper. Upon the filing of the petition and the answer of the defendant company, a receiver was appointed, who qualified, took possession of the property of the defendant corporation and managed its business until it was sold at receiver's sale under order of court, which sale was afterward confirmed, and from which orders and decrees an appeal is prosecuted by the interveners, one a stockholder of the corporation, and the others general creditors who had reduced their demands to judgment before intervening in the action. To the report of the receiver advising a sale of the property and the order of the court directing the sale and the confirmation thereof when made, the interveners objected, protested, and excepted, but without avail.

Counsel for appellee devote a portion of their argument to the question of whether these intervening parties can be heard to complain on appeal after going into court and asking to have their judgments satisfied out of the corporate property, and after, as is claimed, the stockholder had assisted in and consented to the appointment of a receiver. This phase of the case may, we think, be properly disposed of by the suggestion that in our judgment the pivotal point of the whole controversy and the chief inquiry to be made are with relation to the sufficiency of the petition filed in the case, and whether or not it states a cause

of action or discloses equitable grounds for the granting of the relief prayed for or granted to the plaintiffs.

It has frequently been held that the question of the sufficiency of a petition, and whether it states a cause of action, may be raised at any step of the proceedings, even in the supreme court on an appeal, and is open for consideration in the appellate court at any time until and including the filing of a motion for a rehearing: Kemper v. Renshaw, 237 58 Neb. 513, 78 N. W. 1071; State v. Moores, 58 Neb. 285, 78 N. W. 529. If the petition filed in this case does not state a cause of action, if it is defective in substance, if its allegations do not warrant the granting of any equitable relief, then such defect is open for consideration, and the participation of the interveners and appellants in the proceedings had in the court below can in no wise preclude them from urging the insufficiency of the petition to support the orders, decrees and judgment of the court entertaining jurisdiction and trying the cause below. While the prayer to the petition contains a request for general equitable relief, it must, we think, be admitted that it cannot be extended so as to warrant the granting of relief not embraced within or comprehended by the allegations of the pleading. To be sure, the prayer for relief is a part of the petition, but it is no portion of the statement of facts required to constitute a cause of action. Consequently, while it may be broader than the allegations of the petition, the cause of action pleaded cannot be enlarged or made the basis for the granting of relief other than that warranted by the allegations of facts: Fox v. Graves, 46 Neb. 812, 65 N. W. 887, and authorities cited therein.

An examination of the petition in the case at bar renders it obvious that no cause of action is stated therein disclosing a right to the recovery of a money judgment for the amount called for by the bonds, or any portion thereof, or for a foreclosure of the mortgage in satisfaction of any sum which might be found to be due; in other words, none of the debt secured by the mortgage had at the time matured, and there was no breach nor default in the conditions of the mortgage disclosed by the pleadings warranting a foreclosure of the title to and equity of redemption of the property mortgaged, owned and held by the defendant company. This, manifestly, is the view taken by

the parties to the suit and the trial court, since no attempt was made to enforce the obligation secured by the mortgage, or for the sale of the property of the defendant company and the application of its proceeds in satisfaction [238] thereof. What was in fact done was to seize all the property of the corporation, place it in custodia legis by means of the receivership, manage it under the direction of the court for a short period of time, and then dispose of it at receiver's sale subject to the mortgage and the indebtedness secured thereby, mentioned in the pleadings as being held and owned by the plaintiffs. The cause of action, therefore, stated or attempted to be stated, was not in respect of plaintiff's right to collect its indebtedness held against the defendant and enforce their mortgage lien, but their right under the allegations of the petition to have a receiver appointed to take charge of and manage the property and business of the defendant company, and to wind up its affairs by a sale of the plant subject to plaintiff's lien, and the distribution of the proceeds, after paying the costs and charges of the receivership, to those found entitled thereto.

We are thus brought to a consideration of the proposition as to whether the plaintiff was warranted in asking solely for the appointment of a receiver to take charge of and administer the corporate estate and to sell the same as was done, and whether the court was authorized to make such appointment and to enter the orders and decree thereafter made and rendered in the further proceedings, to which exceptions are taken. It is to this proposition that counsel have devoted most of their arguments and to which our attention will now be directed. In the former opinion, it was held that a receivership is a purely ancillary remedy and cannot be maintained in a proceeding instituted solely for that purpose. The enunciation of this proposition is vigorously challenged by appellees' counsel, but a full investigation and consideration of the subject has dispelled from our minds all doubts, if any have heretofore existed, as to its being a correct and sound declaration of the principles of equity governing and controlling a suit when applied to a condition of facts such as are presented by the record in the case at bar. Of course, where the statute authorizes it, and in some well-recognized [239] exceptions to the general rule, the appointment

of a receiver may be and is the main object and purpose of the suit or proceedings. It is likewise true that in some cases of extraordinary character affecting quasi public corporations, and where public interests are so involved as to demand the extension of the equitable principles applicable to receiverships so as to protect such interests, some courts have assumed jurisdiction, and claim authority to appoint a receiver where that is the main purpose of the suit, yet such cases have been characterized as announcing a doctrine both novel and unusual. In all such cases the object of such appointment is to preserve and hold intact the property intrusted to the receiver, and not to destroy, dismember, or by receiver's sale dispossess the corporation of its property and franchise. Possibly the subject may be made a little clearer by some reference to the nature and character of receiverships and the principles underlying the subject, as gathered from the text-writers and the decisions of the courts of last resort. A receiver by his appointment does not become a litigant in the action, nor does he represent one more than the other of any of the parties to the controversy. He, when appointed, takes possession of the property as the right arm of the court for the benefit of the party ultimately entitled to it: Beach on Receivers, sec. 2. "A receiver is," says the same author, "a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, pendente lite, the fund or property in litigation": 2 Beach on Private Corporations, sec. 772. The sequestration of property by a receiver in a suit in equity is analogous to the seizure of property by attachment in an action at law. The appointment of receivers, says the supreme court of Ohio, is classed as one of the provisional remedies, like the proceedings by injunction or in attachment. Says the court: "A provisional receivership is, in effect, an injunction, and something more stringent still. It is to be granted with great caution, and only in a case of apparent pressing
240 necessity: Edwards on Receivers, 13. The appointment of a receiver is an equitable remedy, and bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. Hence the appointment of a receiver has been said to be an equitable execution: Jeremy on Equity Jurisdiction, 249"; Cincinnati etc. R. Co. v.

Sloan, 31 Ohio St. 1, 7. See, also, Davis v. Gray, 83 U. S. 203, 21 L. ed. 447. It must be made to appear affirmatively that there is a reasonable possibility that the plaintiff will ultimately succeed in obtaining the general relief sought in the suit in which the receivership is asked: Smith on Receivership, sec. 5 (b); Beach on Receivers, sec. 48. "The appointment of a receiver," says the supreme court of Pennsylvania, "is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion": Chicago etc. Co. v. United States Petroleum Co., 57 Pa. St. 83.

"The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are wholly ancillary or provisional, and the appointment of a receiver does not affect, either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. It adjudicates and determines the rights of no party to the proceeding and grants no final relief directly or indirectly: Smith on Receiverships, sec. 2; Beach on Receivers, sec. 51; Pomeroy on Equity Jurisprudence, secs. 171, 1319, 1330; Miller v. Bowles, 58 N. Y. 253. In support of the rule announced by the text-writers to the effect that generally the appointment of receivers at the instance of private parties is an ancillary remedy administered by the court, provisional in character, and in aid of the primary object of the litigation, may be cited French Bank Case, 53 Cal. 495; Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272; Union Mutual Life Ins. Co v. Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90; Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 63 Am. St. Rep. 389, 38 L. R. A. 122, 70 N. W. 216; Barry v. Briggs, 22 Mich. 201; People v. Weigley, 155 Ill. 491, 40 N. E. 300.

[241] Aside from the question of the sufficiency of the petition because the appointment of a receiver is the sole and primary object of the suit; and no cause of action or ground for equitable relief otherwise being stated, another insuperable obstacle, and one closely related to the subject heretofore discussed, is the fact that the jurisdiction of a court of equity is invoked for the purpose of seizing the corporate property of the defendant company and winding up its affairs without statutory authority therefor, and without the case being brought within equitable principles sanctioned and

taken cognizance of by the courts of chancery of England, from which the equity jurisdiction exercised by the courts of this state is derived. Some authorities are cited by counsel for appellees to the effect that a sale of all the corporate property does not necessarily work a dissolution of the corporation or terminate its legal existence. This, doubtless, is true, and in the cases cited the property, in all probability, was properly seized in satisfaction of just obligations, leaving the corporate entity unaffected, and nothing further was attempted. It may be, and probably is, true that a dissolution of a corporation in a technical sense can be accomplished by the expiration of its charter or the decree of a court of competent jurisdiction forfeiting the same. Yet in the case at bar, in truth and substance, the corporation has been, through the instrumentality of a receiver and by the order and decrees complained of, stripped of its estate, devested of its property and franchise, and its affairs brought to a final termination as completely and successfully as if its dissolution were the avowed object and purpose of the suit.

In Neall v. Hill, 16 Cal. 145, 149, 76 Am. Dec. 508, it is said: "We are also of opinion that the court erred in the appointment of a receiver, and in decreeing a sale of the property and a settlement of the affairs of the corporation. This decree, if permitted to stand, must result in the dissolution of the corporation; and in that event the court will have accomplished in an indirect mode that which, in this proceeding, [242] it had no power to do directly. It is well settled that a court of equity as such, has no jurisdiction over corporate bodies, for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised, in the absence of a statute conferring the jurisdiction."

In Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 322, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122, it is said: "It is certainly true that, in the absence of express statutory authority, jurisdiction of courts of equity does not exist over the corporate bodies to such an extent as to justify them in dissolving corporations, or of winding up their affairs and sequestrating their property. This seems to be so well settled that there is scarcely a dissenting voice in authority": See, also, Wheeler v. Pullman Iron etc. Co.,

143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; Link Belt Machinery Co. v. Hughes, 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673; State v. Second Judicial District Court, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392.

We have examined with diligence and care the many authorities cited by appellee in support of its contention as to the authority of the court on equitable grounds to appoint a receiver, the regularity of the appointment in the case at bar, and the subsequent proceedings had, but we find none of them to give substantial support to the doctrine contended for. In each and all of the authorities save the exceptional cases heretofore referred to, the jurisdiction of the court in appointing a receiver was invoked as an exercise of power ancillary and incidental to the principal relief sought by the parties to the litigation. The parties all appear to have been either stockholders or creditors who had an actual and subsisting demand, a present right or claim which it was sought to have enforced, and the appointment of a receiver was in aid of and for the purpose of making effective a prospective judgment or decree to be rendered in the action which, prima facie, they were shown to be entitled to at the time of its commencement and the appointment of such receiver. We find no authority giving unqualified support to the doctrine that a mere mortgage of corporate property, [243] because of an anticipated default of the indebtedness, a possible inability to continue much longer the conduct of the business, threatened attachments, financial weakness or insolvency, and in the event of the suspension of business, a consequent depreciation of the value of the mortgaged property, may for these reasons, in an independent action and for no other purpose, have a receiver appointed, the corporate property sequestered, the business conducted by the receiver until by a receiver's sale the estate may be sold subject to the mortgage indebtedness, and the affairs of the corporation terminated. To establish such a doctrine in this jurisdiction is, in our judgment, unwarranted, unsupported by authority and fraught with dangerous consequences.

The petition, we are satisfied, states no cause of action, nor warrants the granting of any equitable relief, and therefore the order of sale of the corporate property and the confirmation thereof, as well as the appointment of a receiver, was without authority, unsupported by the plead-

ings, and for such reasons the judgment heretofore rendered reversing the orders and decrees so entered should be adhered to, which is accordingly done.

Proceedings for the Appointment of a Receiver pendente lite are but ancillary or auxiliary to the main action, and are not its ultimate object: Sheridan Brick Works v. Marion Trust Co., 157 Ind. 292, 87 Am. St. Rep. 207.

The Appointment of a Receiver in pursuance of a contract with the persons interested is discussed in Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274. And appointments without notice are discussed in Tuttle v. Blow, 176 Mo. 158, 98 Am. St. Rep. 488; Larsen v. Winder, 14 Wash. 109, 53 Am. St. Rep. 864.

Grounds for the Appointment of a Receiver for a corporation are discussed in the monographic note to Cameron v. Groveland Imp. Co., 72 Am. St. Rep. 48.

VAN DOREN v. WIEDEMAN.

[68 Neb. 243, 94 N. W. 124.]

HOMESTEAD, Forced Sale of—Restriction of Method of.—The sections of the statute of Nebraska limiting the value of a homestead, designating the instances in which it is liable to forced sale, and providing that both spouses must join in a conveyance thereof, exclude all other means of conveying or encumbering the homestead or rendering it liable to forced sale. (p. 423.)

HOMESTEAD, Forced Sale—Appraisement, Absence of.—No valid forced sale can be made as affecting the homestead right until after an appraisement thereof in the manner prescribed by statute, at the instance of the creditor. (p. 426.)

HOMESTEAD, Sale of Under Execution Against Husband After His Transfer to His Wife.—If the transfer of a homestead is made by a husband to his wife, a judgment having first been entered against him, a subsequent sale under execution issued on such judgment, no proceedings having been had to annul the conveyance, is void. (p. 427.)

HOMESTEAD—Execution Sale, Effect of Denial of Motion of Purchaser to be Released from His Bid.—If an execution sale of a homestead is void for want of appraisement, the denial of a motion by the purchaser to be relieved from his bid does not place him in any better, nor the homestead claimants in any worse, position than before. (p. 427.)

HOMESTEAD.—An Execution Sale of a Homestead Under a Judgment Against the Husband Only conveys no greater title than would a conveyance by him in which his wife did not join. (p. 427.)

HOMESTEAD, Estoppel Arising from Claiming the Proceeds of a Forced Sale of.—If, after an execution sale of a homestead and the payment of his bid by the purchaser, the wife of the judgment debtor appears and claims and receives the surplus proceeds of such sale, a conveyance of the homestead having been previously made to her by her husband, this does not estop her from afterward avoiding the sale on the ground that it was void. Before the purchaser can invoke an estoppel, it must appear that he changed his position relying on some action taken by the wife. (pp. 429, 430.)

Byron Clark and C. A. Rawls, for the plaintiffs in error.

Carey S. Polk, contra.

[244] KIRKPATRICK, C. This is an error proceeding prosecuted from a judgment of the district court for Cass county in an action of ejectment brought by Gust H. Wiedeman, now deceased, the action having been revived in the name of his administrator and heirs at law, defendants in error, against Sarah E. Van Doren and Aaron L. Van Doren, plaintiffs in error. There was judgment for plaintiff below. The petition filed in the district court alleges: "That plaintiff is the owner and is entitled to the possession of the northwest quarter of section seventeen (17) in township twelve (12) north, range nine (9) east of the sixth principal meridian, in said county of Cass, and that said defendants and each of them since the eighteenth day of April, 1899, have unlawfully kept and still keep the plaintiff out of possession thereof. Wherefore the plaintiff prays judgment for the delivery of possession of said premises to him and for his costs herein expended." Separate answers by the Van Dorens consisted of general denials.

[245] The court found that the Van Dorens were husband and wife, and as such were living upon the premises; that on April 2, 1898, Aultman, Miller & Co. recovered a judgment against A. L. Van Doren for one hundred and fifty-four dollars and seventy cents, a transcript of which was filed in the office of the clerk of the district court April 4, 1898; that on November 11, 1898, A. L. Van Doren transferred the title to the premises to his wife, the deed being recorded on March 11, 1899; that execution was issued on the judgment February 7, 1899, and levied upon the premises; that no proceedings have been taken by the creditors, either to set aside the conveyance or to have the homestead interest of the Van Dorens appraised; that the land was sold under the execution on March 31, 1899, the sum realized being two thousand seven hundred and twenty-five dollars; and after the deduction of the costs and judgment, there remained in the hands of the sheriff two thousand four hundred and forty-nine dollars and eight cents; that the sale was confirmed April 10, 1899, a sheriff's deed issuing to G. H. Wiedeman, the purchaser; that up to May 1, 1899, Sarah E. Van Doren had not been a party to the proceedings; that on that day she filed a motion in the case of Aultman, Miller

& Co. v. A. L. Van Doren, her husband, asking the court to direct the sheriff to turn over the surplus of two thousand four hundred and forty-nine dollars and eight cents to her (the fund arising from the sale of the premises), claiming to be the owner thereof; that the district court granted this motion, directing the surplus to be paid to her; that the husband joined with his wife in demanding of and receipting to the sheriff for such surplus; that subsequent to the confirmation of the sale, and on April 22, 1899, G. H. Wiedeman asked the court to set aside the sale and relieve him of his bid, for the reason that he could not obtain possession of the land; that the Van Dorens made no appearance on the hearing of such motion, neither of them having any actual notice of the motion to confirm the sale; that Wiedeman's motion to set aside the sale, and Sarah E. Van Doren's motion asking that the surplus be paid to her, were submitted and passed upon the same day, June 21, 1890, the former being overruled, the latter sustained.

Upon these findings of fact the court held, first, that the [246] ownership and occupancy of the premises by the Van Dorens was a sufficient selection of the premises as a homestead, and that all persons, including the plaintiff G. H. Wiedeman, were charged with notice of the homestead character of the premises, and that such character continued in said land up to and including the sale under execution; second, that when Sarah E. Van Doren appeared in the case of Aultman, Miller & Co. against A. L. Van Doren, filing a motion asking that the surplus of the sale be paid to her, she waived antecedent irregularities, and waived the right to claim the land as a homestead; that A. L. Van Doren and Sarah E. Van Doren are now estopped to deny the validity of the sale and to claim the land as a homestead. Thereupon judgment was rendered for plaintiff below, which was superseded, plaintiffs in error being still in possession of the premises.

The findings of fact by the trial court are in the main supported by the evidence, with the exception that the record fails to show that A. L. Van Doren took any part in securing the payment of the surplus to his wife further than that he made an affidavit, which his wife filed with her motion, and that he, apparently at the instance of the sheriff, who by the court was ordered to pay the money to Mrs. Van Doren, joined with his wife in receipting for the money. In addi-

tion to matters found by the court, it appears that the land was appraised by the sheriff in gross at six thousand four hundred dollars, which sum, after the deduction of a prior encumbrance of two thousand dollars and certain unpaid taxes, was reduced to four thousand and eighty-one dollars and sixty-three cents. It was twelve days after confirmation of the sale, and on April 22, 1899, that Wiedeman, the purchaser, desiring to be relieved from his bid, filed a motion assigning the following reasons why the sale should be set aside: "1. For the reason of mistake and irregularity in said sale; 2. For the reason that said property was appraised as the property of said A. L. Van Doren, and sold as such to this plaintiff, when in truth and in fact the said A. L. Van Doren was not the owner thereof; 3. For the reason that the said G. H. Wiedeman is unable to get or secure title thereto."

[247] The motion of Mrs. Van Doren referred to, and filed May 1, 1899, is as follows: "Now comes Sarah E. Van Doren, owner of the real estate sold in the above cause to the purchaser, G. H. Wiedeman and moves the court to order the sheriff to pay the surplus arising from sale to this owner, Sarah E. Van Doren."

Neither of plaintiffs in error were parties to the motion of Wiedeman to be relieved from his bid, apparently having no knowledge thereof, although Mrs. Van Doren was present in court on June 21, 1899, by attorney, urging her own motion. However both motions appear to have been ruled upon at the same time, the journal entry being as follows: "Now on this day this cause came on for decision, having been heretofore argued and submitted, on the motion to set aside sale under execution and confirmation thereof, on consideration whereof the court doth overrule the same, and the sheriff is ordered to pay over money to Mrs. Van Doren"; to which order it appears Wiedeman took an exception.

Upon paying the money on the same day, the sheriff made a condition of such payment the requirement that the husband sign with Mrs. Van Doren. Wiedeman resided near the land in controversy, was well acquainted with plaintiffs in error, and knew they occupied the premises as a homestead. He was the notary who took the acknowledgment to the deed conveying the premises to Mrs. Van Doren.

It is contended by plaintiffs in error that the rule of caveat

emptor applies to the purchaser at this sale; that by the confirmation of the sale the homestead was in no manner affected; that the record discloses nothing to estop plaintiffs in error to assert their homestead right herein; that the parties being without power to alienate or encumber their homestead except in the manner prescribed by statute, no estoppel can be invoked, as estoppel cannot supply the want of power; that judgment against the husband was no lien against the homestead; that sale on such [248] judgment did not devest title; that the homestead interest embraced the entire tract, and that no appraisement of the property and severance of the homestead interest was had in pursuance to the statute, this in itself being a complete defense in the action of ejectment.

On the part of defendants in error it is contended that by accepting the proceeds of the sale in the hands of the sheriff, plaintiffs in error estopped themselves from questioning the validity of the sale; that, by so accepting the surplus, they ratified any irregularity in the proceedings theretofore had; that they actively affirmed the sale by seeking to procure the surplus; and, further, that all such matters could be shown in ejectment, although not specially pleaded.

The question thus presented is whether Mrs. Van Doren, by filing her motion asking for the payment of the surplus of the sale to her, a fund created by the sale of the premises, and thus appearing in the action after sale and confirmation thereof, has placed it beyond the power of herself and husband to assert a right to the homestead exemption. Section 1 of chapter 36 of the Compiled Statutes (Annotated Statutes, 6200), limits the value of the homestead; section 3 designates the instances in which the homestead will be liable to forced sale; section 4 provides that both spouses must join in a conveyance. We think it is in entire accord with judicial construction of exemption laws to regard the sections referred to as exclusive of all other modes of conveying or encumbering the homestead, or rendering it liable to forced sale, unless, as hereinafter considered, the claimants, while in possession, may waive their right, and whether plaintiffs in error did so waive it.

Other sections of the same chapter contain authority for creditors to satisfy their claims out of the property of homestead claimants when the homestead is so intertwined with

other property that the latter, which is liable upon execution, cannot be severed and rendered available without destroying the value or identity of the homestead. But it will scarcely be contended that this is a forced sale of the [249] homestead, but rather a transformation of the entire property, including the homestead, into a form of wealth or property in order that the severance may be accomplished. The claimants have not suffered a loss of the homestead, but only the unavoidable prejudice of having the homestead transformed into a money equivalent. The statute is unambiguous, and the forced sale of the premises constituting the homestead is made to depend upon certain conditions, none of which are found to exist in the case at bar. The only basis for the right of defendants in error must be found in an alleged waiver by plaintiffs in error.

Much has been said in the argument of this case as to the right or ability of homestead claimants to waive the right. On the part of plaintiffs in error it is said that the power to waive does not exist, and numerous authorities are cited tending to show, in cases where waiver was interposed to defeat the claim of homestead, that there is no power exclusive of the modes laid down by statute, and that want of such power cannot be supplied by estoppel: Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937; Tapley v. Ogle, 162 Mo. 190, 62 S. W. 431.

By defendants in error it is said that the homestead right is a personal privilege, to be waived or surrendered by the claimant whenever he sees fit, and that it will be held to have been waived, unless he has made a timely assertion of the right. In support of this theory it may be admitted that numerous expressions to the effect that the exemption is a personal privilege occur in the prior decisions of this court, to obviate which it is suggested by counsel for plaintiffs in error that, however applicable such language may have been under the law as it obtained in this state prior to 1873, by subsequent amendments thereto, notably that providing for the signature and acknowledgment of both spouses to any instrument conveying or encumbering the homestead, all reference to exemption being a personal privilege of the head of the family subject to waiver is in conflict with the spirit as well as the letter of the law as it now reads.

[250] With reference to this contention it may be said that possibly some confusion has resulted by reason of the fact that the law of 1867 has been amended in some important particulars, especially with regard to the voice of the wife in the disposition and control of the homestead. The law, prior to the amendment referred to, was construed as conferring upon the head of the family a personal privilege, waivable by the husband alone: Jackson v. Creighton, 29 Neb. 310, 45 N. W. 638.

Speaking of the law as it then obtained, Judge Lake, in Rector v. Rotton, 3 Neb. 171, 176, said: "Even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best." Clearly this language would be inapplicable to the law as it now stands, and it has accordingly been held that a waiver can only be invoked when those entitled to assert the right have been parties to the proceedings resulting in the sale of the premises, and these proceedings must have been adversary in their character, and an opportunity must have been afforded to the claimants to assert their homestead right: Brownell v. Stoddard, 42 Neb. 177, 60 N. W. 380.

The soundness of the holding that the homestead right can in any event be waived, or that the doctrine of equitable estoppel can be invoked to nullify the requisites of the statute as to the alienability of the homestead, is open to serious question, in the opinion of the writer of this opinion. It is not difficult to conceive instances wherein such a rule would be effective to sacrifice the rights of those whose welfare it is the especial and apparent design of the legislature to conserve. But however that may be, the decisions of this court have never gone further than holding that the waiver, in order to be effective, must be alike and equally imputable to both husband and wife. If confined to the acts or conduct of the husband alone, he would be enabled to do indirectly what the law has shorn him of all power to do directly.

In this case, Mrs. Van Doren had appeared in no proceedings against her husband. The trial court concluded, [251] and we think rightly, that the Van Dorens had made a timely selection of their homestead, and that the purchaser, Wiedeman, knew of the homestead character of the premises. The statute clearly contemplates that the creditor,

after the homestead has been selected, should be the moving party to procure an appraisement, to the end that his execution may attach to the excess over and above the homestead exemption: Comp. Stats., c. 36, sec. 5 (Annotated Statutes, 6204). At the time the execution was levied, it cannot be said that the Van Dorens had neglected any duty owing by them. No valid sale as affecting the homestead right could be effected until after an appraisement, in the manner prescribed by statute, at the instance of the creditor: Quigley v. McEvony, 41 Neb. 73, 59 N. W. 756. No attempt whatever was made to procure such appraisement. The sale as affecting the homestead was therefore wholly void, and the homestead right of the Van Dorens was not devested thereby. If thereupon, without any intervening act of the plaintiffs in error, the purchaser had brought ejectment, his absence of right could have been easily demonstrated upon the theory that the sale, not having been made in conformity with law, was wholly nugatory as affecting the homestead right. The exemption law is for the benefit of the family as an entity. The law jealously guards this entity, and seeks to preserve it intact, because the highest concern of society demands its preservation. To that end the law has always been construed as mandatory, making observance of its various requirements imperative before the homestead will be rendered available to creditors of the husband. In Baumann v. Franse, 37 Neb. 807, 56 N. W. 395, it was held that a sheriff's deed made in pursuance of a sale of the debtor's homestead, which at the time is actually occupied by himself and family, the levy being made under an ordinary execution, will not devest the debtor of his title or convey any title to the purchaser. It is well settled in this state that the rule of caveat emptor applies to judicial sales. We are therefore very clear that by proceeding to sale under the execution [252] without first having followed the provisions of the statute for appraisement, the execution creditor did not succeed in devesting the Van Dorens of any right of homestead they enjoyed in the premises, and that the purchaser obtained no right as against such homestead. There is still another consideration which it seems would make this sale without any force or legal effect. It appears conclusively that the title to the premises had been transferred to the wife long prior to the attempted sale, and that Wiedeman had actual notice of such transfer. It is

true that, prior to this transfer, the lien of the judgment had attached to the property of the judgment debtor which was not exempt but that fact, we think, is immaterial. No proceedings were had to annul this conveyance. Being a homestead, it is difficult to see how it could have been avoided. Upon what theory could the property of Mrs. Van Doren be subjected by this process to satisfy the personal debts of her husband? It is certainly elementary that an execution against A cannot be levied upon the property of B.

The denial by the court of Wiedeman's motion to be relieved from his bid, he having apparently become aware of the defects in the proceedings already had, neither placed him in any better position than he was when he made his bid nor the Van Dorens in any worse position.

Another reason might be suggested why Wiedeman obtained no rights as affecting the homestead under the sheriff's sale. Section 499 of the code provides: "The sheriff or other officer, who, upon such writ or writs of execution, shall sell the said land and tenements, or any part thereof, shall make to the purchaser or purchasers thereof as good and sufficient a deed of conveyance of lands and tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same, at the time they became liable to the judgment, or at any time thereafter." Under this statute Wiedeman would get the same title to the homestead that A. L. Van Doren, the husband, could have conveyed by [253] deed. In face of the statute providing that a conveyance of a homestead must be signed and acknowledged by both husband and wife, A. L. Van Doren was absolutely powerless to convey or encumber the homestead in any way, and it follows that as against the homestead the sheriff's deed was void, conveying no rights.

We come now to the question whether the gross defects in the proceedings as pointed out were cured, and the sale validated, by the application of Mrs. Van Doren to have the surplus paid to her. If the sale had been merely irregular, confirmation would have been sufficient to cure these irregularities: O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274. A voidable sale is effective to pass title until attacked directly. It is capable of ratification. But a void sale conveys no title, is incapable of ratification, and is subject to be shown to be null, even in collateral proceedings: Moody v. Moeller, 72 Tex. 635, 13 Am. St. Rep. 839, 10 S. W. 727.

We are unable to find merit in contention of counsel for defendant in error, urged with much earnestness, that Mrs. Van Doren is estopped to claim a homestead right in the premises. Long before she appeared in the action, Wiedeman had purchased at sheriff's sale, he had paid in his money, the sale had been confirmed, he had received his sheriff's deed, the money he paid in had been distributed to other creditors all except the surplus—and all this before Mrs. Van Doren had ever appeared in the proceedings. In order for Wiedeman to invoke an estoppel, it must appear that he changed his position, relying upon some action taken by Mrs. Van Doren. He had taken no action since her appearance, except his attempt to recover the premises in ejectment: Lingonner v. Ambler, 44 Neb. 316, 62 N. W. 486; Macfarland v. West Side Improvement Assn., 56 Neb. 277, 76 N. W. 584.

Again, it would seem that in no event could estoppel supply the want of power in Mrs. Van Doren to convey the homestead except in the manner provided by statute: France v. Bell, 52 Neb. 57, 71 N. W. 984; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937; Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019; Tapley v. [254] Ogle, 162 Mo. 190, 62 S. W. 431; Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980; Hubbell v. Canady, 58 Ill. 425.

It cannot be contended that Mrs. Van Doren did anything inconsistent with the theory that the money she received was the money realized from the sale of the land over and above the homestead right. There was nothing in the order of the court which would give her any intimation that the money she was receiving was money realized from the sale of her homestead. The court did not order the surplus paid to her and her husband, as should have been done if it was money realized from the sale of the homestead. The order of the court was to pay the money to Mrs. Van Doren, owner. If it was money realized from the sale of the homestead right, it was the money of herself and husband jointly. She had a right to suppose that, inasmuch as the legal title stood in her name and the court ordered the money paid over to her, she was receiving only the surplus purchase price of the land above the homestead exemption. When we say "void," referring to the sale had herein, we mean that the sale was wholly ineffectual to deprive the Van Dorens of their homestead right in the premises. It is quite probably that under the authority of Horbach v. Smiley, 54 Neb. 217, 74 N. W.

623, Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980, and Swift v. Dewey, 20 Neb. 107, 29 N. W. 254, the sale, together with the acts of the Van Dorens thereafter, resulted in conveying to the purchaser whatever interest there may be in the premises in excess of the homestead interest of the Van Dorens. This being an action in ejectment, the question of the interest obtained by the purchaser in the premises above the homestead exemption cannot be, and is not, determined in this case. But it is evident that the interest obtained by the purchaser cannot be a basis for a right of recovery of the entire premises in an ejectment proceeding.

There can be no doubt that what Mrs. Van Doren did in the premises is entirely consistent with the contention of plaintiffs in error, that their homestead interest in the land has never been set off or sold, and that they are in no way estopped to claim their homestead right.

255 But even if our conclusion upon this branch of the case were otherwise, defendants in error would still be in no position to sustain the correctness of the judgment of the trial court. If the sale is to be validated by the action of Mrs. Van Doren in asking for and obtaining the surplus, obviously it must be upon the theory that her act constituted a waiver of the homestead right. As already indicated, this waiver must be one imputable to both her and A. L. Van Doren. It is conceded in this case that neither of the Van Dorens had done anything which would furnish the basis of a waiver prior to the filing of the motion by Mrs. Van Doren asking for the payment to her of the surplus of the sale. If any waiver of the homestead, happen when or how it may, must be chargeable to both spouses, then it is immaterial in this case, under our view of the record, whether, by asking for or retaining this surplus, Mrs. Van Doren waived the homestead right on her part. We may for the present purpose assume she did, and confine our inquiry to whether such a waiver can be imputed also to A. L. Van Doren. The trial court, adopting the theory that Mrs. Van Doren did waive the right by asking for the surplus, concluded that her husband was equally chargeable with the waiver. In this conclusion we are quite clear the learned trial court erred. Its only basis is that after the motion of Mrs. Van Doren had been favorably ruled on, and an order issued to the sheriff to pay the surplus to her, the sheriff, apparently upon his own motion and out of abundant caution, required that Mrs. Van Doren's husband sign the receipt for

the surplus with her. It is difficult to see what power the sheriff had to extend the scope or legal effect of the order to pay the money to Mrs. Van Doren. His function was purely and exclusively ministerial. The order was to pay the money to Mrs. Van Doren. He would have been chargeable with no dereliction of official duty had he contented himself with merely obeying the order in his hands. The right of Mrs. Van Doren, if any, to the money, must be established by the order of the court, and not by arbitrary [256] conditions annexed thereto by the sheriff. The circumstances under which A. L. Van Doren was induced to sign the receipt with his wife cannot be said to have been in any sense a proceeding in which any duty rested upon him to assert his homestead right, nor can his conduct in such a situation be construed into a waiver of the family homestead. It would be a perversion of the law so to hold. If the homestead right of the Van Dorens is to be defeated in this action on the ground of waiver, and if that waiver must be imputable to both husband and wife, it is clear that under no theory of the case can it be said that A. L. Van Doren ever waived the homestead right: Campbell v. Babcock, 27 Wis. 512; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937.

It follows that the sheriff's deed issued in pursuance of the attempted sale of the homestead was insufficient upon which to base a right of recovery in the plaintiff in this ejectment action. The judgment of the trial court is, therefore, wrong, and it is accordingly recommended that the same be reversed, and the cause remanded for further proceedings in conformity with the law.

Hastings and Lobingier, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

Equitable Estoppel may be invoked under some circumstances to defeat the operation of homestead laws: Adams v. Gilbert, 67 Kan. 273, 100 Am. St. Rep. 456. Compare Hamby v. Lane, 107 Tenn. 698, 89 Am. St. Rep. 967. It has been said that when a person not under disability is sued, and a homestead is involved, it will be affected by any neglect to assert it precisely the same as any other right: Graham v. Culver, 3 Wyo. 639, 31 Am. St. Rep. 105. However, the waiver of a homestead right by a husband cannot affect his wife's right therein: Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554. And it has been held that a mortgage of the homestead of a married man, executed by him, with his wife's signature affixed thereto by her verbal re-

quest, for the purpose of obtaining money for her use, together with the full execution of such purpose, does not estop her from denying the validity of the mortgage: Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 84 Am. St. Rep. 927. That contracts to waive a homestead are unenforceable as against public policy, see Bunker v. Coons, 21 Utah, 164, 81 Am. St. Rep. 680; Zachman v. Zachman, 201 Ill. 380, 94 Am. St. Rep. 180.

WILLIAMS v. MILES.

[68 Neb. 463, 94 N. W. 705, 96 N. W. 151.]

WILLS, Presumption of Destruction of.—If a will is shown to have been made and left in the custody of the testator and cannot be found after his death, it is presumed to have been destroyed by him with the intent of revoking it. (p. 434.)

WILLS, Presumption of Destruction of, When not in the Testator's Custody.—If a will is traced out of the testator's custody and cannot be found after his death, the burden is on him who asserts a revocation to show that it came once more under the testator's control and was destroyed by his direction. (p. 434.)

WILLS—Presumption of Destruction of, When not Conclusive. Though a will which was in the possession of the testator and cannot be found after his death is presumed to have been destroyed by him with intent to revoke it, this presumption is one of fact only, to govern in the absence of circumstances tending to a different conclusion, and may be overcome by circumstantial or other evidence to the contrary. (pp. 434, 435.)

WILLS.—The Declarations of a Testator After the Execution of His Will are Admissible to rebut the presumption arising from its not being found after his death that it was destroyed by him with intent to revoke it. (p. 435.)

CRIMINAL LAW of England—What Deemed to have been Adopted by American Statute.—The professed adoption of the common law of England does not require controlling effect to be given to that law as considered and understood prior to the Revolution. The terms "common law," as here employed, refer to that general system of law which prevails in England as distinguished from the Roman or civil law system, which was in force prior to the Louisiana purchase. Hence, the statute does not require adherence to the decisions of the common-law courts prior to the Revolution, in case the court considers subsequent decisions either in England or America better expositions of the principles of that system. (p. 438.)

WILLS, Revivor of Earlier by Destruction of Later—Presumption.—If a will is executed which revokes a prior will, either expressly or by implication, and the latter will is itself revoked by its destruction by the testator, the former will, though preserved, is not thereby revived unless such appears to have been the intention of the testator, to be deduced from all the circumstances. So far as there is any presumption, it seems to be against the revivor. (p. 439.)

WILLS—Revocation of One by Another, Sufficiency of Evidence of.—To establish the revocation of one will by another it must be shown not merely that there was a new and later will, but also that it contained a clause of revocation, or its contents must be proved so as to establish an inconsistency between the instruments requiring

the court to hold that the one revoked the other by implication. (p. 440.)

WILLS—Declarations of a Testator to Show that One Will Revoked Another.—The contents of a lost or destroyed will, whether with respect to a clause of revocation or to general provisions from which the revocation of the will is to be implied, cannot be shown solely by the declarations of a testator. (p. 440.)

WILLS, Sufficiency of Evidence of Contents of a Later Which is Claimed to Revoke an Earlier.—A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating the probate of such prior will, although, by reason of its loss or destruction, the exact dispositions made therein cannot be shown, and are hence incapable of execution. It is enough to prove that the lost will revoked the former one. If that much is proved, the contents need not be further shown. (p. 440.)

WILLS, Revocation of One by Another—Burden of Proof.—The burden is upon those who attack the earlier will to show that it was revoked by a subsequent will, and if they do not establish an express revocatory clause, conjecture and probability are not sufficient; nor will the words, "This is my last will," have any weight whatever. (p. 440.)

WILL, LOST—Declaration of Testator, Competency of.—The contents of a lost will cannot be proved solely by the declarations of the testator, but they are admissible to corroborate more direct evidence of the contents of the will and to prove its existence. (p. 440.)

WILLS—Witnesses, Competency of Persons Who will be Benefited.—Where it is claimed that an earlier will was revoked by a later, persons who would take as heirs or next of kin but for the earlier will are competent, as witnesses, to testify to conversations with the testator, including his statements and declarations respecting the execution of the will, but evidence of such declarations should be scrutinized carefully. (p. 442.)

WILLS—Attestation Clause.—An attestation clause is not required to a will. Therefore, subscribing witnesses to a will may testify that the testator signed and they witnessed and subscribed in the manner prescribed without proving that there was any attestation clause or establishing the contents thereof. (p. 442.)

WILLS, Revivor of One by Another.—Where a later will does not contain any express clause of revocation, a former will is revived only so far as inconsistent with the later. A complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. (p. 443.)

WILL, Lost, Evidence of, When Sufficient to Show Revocation of Prior Will.—Where parol evidence is relied upon to show that a will in existence was revoked by implication by a prior one, which cannot be found, such evidence should be clear, unequivocal, and convincing, and the contents of the latter will must be so far disclosed that the court may know that if both wills were before it, the two might not be harmonized in whole or in part. (p. 444.)

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Francis Martin, Edwin Falloon and Clarence Gillespie, contra.

[465] POUND, C. The general purpose and nature of this controversy are stated in the opinion of the court on another branch of the cause: Williams v. Miles, 63 Neb. 859, 89 N. W. 451. It will be sufficient to say, for the purposes of the present opinion, that the decree appealed from was rendered in a suit begun originally in the county court of Richardson county for the purpose, among other things, of having an order admitting a certain instrument to probate as the last will of Stephen B. Miles vacated and set aside. Stephen B. Miles died at Falls City, in this state, in 1898, leaving surviving him Joseph H. Miles, one of the appellees, and Samuel A. Miles, one of the appellants, his sons, and a number of descendants of two deceased daughters. In the year 1888, he had made a will at Rulo in Richardson county, in which he gave substantially his entire estate, amounting at the time of his death to upward of one million dollars, to Joseph H. Miles, excluding Samuel A. Miles, the issue of his two daughters, and many others who had claims upon his bounty. During the period intervening between the execution of his will and his death, he had ceased to take an active hand in business, and lived mostly at hotels in St. Louis, Missouri, or at Falls City. After his death, Joseph H. Miles, who was present when the will known as the Rulo will was executed, in 1888, and was acquainted with its contents, made an extensive search in every place in which papers of the deceased were known to be or were likely to be found, for the purpose of ascertaining whether there was a will. As a result of this search, he testifies that he found the Rulo will in an unlocked valise in a room in a hotel at Falls City, which had been occupied by the deceased, under circumstances which, to say the least, are somewhat extraordinary. He presented the will to the county court of Richardson county and procured its probate. The appellants' case is that in 1897 the testator executed a new will at a hotel in St. Louis, where he was in the habit of spending his winters, which [466] had the effect of revoking the Rulo will; that Joseph H. Miles learned of the existence of this will while searching for papers left by his father; and that he fraudulently concealed and withheld his knowledge thereof, and by so doing procured the will of which he was the beneficiary to be probated. It is also charged that he obtained possession of the will executed at St. Louis and has retained the same, and concealed its contents from the plaintiffs, with

the intent and purpose of cheating and defrauding them, the heirs at law, and other devisees and legatees of the testator. The later will, if there was one, has not been found.

The evidence, with reference to the execution of what may be called the St. Louis will, consists of the testimony of two witnesses—the manager and clerk of the hotel in St. Louis—who appear to have been well acquainted with the testator. They testify that within a few days after a conversation which one of them had with the testator regarding his will, the testator stated that he was going to make his will at once, and apparently went out of the hotel for that purpose; that several hours thereafter he came to the office in the hotel and stated that he had made a will; that either the next day or within two or three days, they were summoned to the testator's room, where they found him with some document drawn upon legal-cap paper before him; that the testator said to them, "Gentlemen, I want you to witness the signature of my will"; and that he thereupon took a pen, and, saying, "This is my last will and I want you to witness the signature to it," signed his name, and procured the witnesses to subscribe theirs also. The testimony of these witnesses is very clear and circumstantial as to the execution of the instrument, but they do not claim to know anything of what the paper contained, further than the statement of the testator that it was his will. There is, however, not a little evidence as to declarations of the testator tending to show that he had made dispositions of his property inconsistent with the terms of the Rulo will, and there is [467] much circumstantial evidence to indicate substantial reasons moving him so to do. The trial court found for the defendants, and rendered a decree accordingly, which is now appealed from.

On behalf of the appellees it is urged that, assuming the St. Louis will has been proved, since the testimony by which it is shown establishes that the testator retained custody of or had ready access to it, and it could not be found at his death, we must take it to have been destroyed by the testator with the purpose of revoking it, and that such revocation, in the absence of a contrary statutory provision, and by virtue of chapter 15a of the Compiled Statutes (Annotated Statutes, 6950) would have the effect of reviving the prior will. Each of these propositions requires some qualification. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is

that he destroyed it animo revocandi: 1 Jarman on Wills, 5th ed., *133; Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140; Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; Gardner v. Gardner, 177 Pa. St. 218, 35 Atl. 558. If the will is traced out of the testator's custody, on the other hand, the burden is on him who asserts a revocation to show that it came once more under the testator's control, or was destroyed by his direction: 1 Jarman on Wills, *133. In such cases, if the person into whose hands the will is traced had an interest in procuring its destruction, some courts have suggested that they would go very far in presumptions as to the contents of the lost will and the mode of its disappearance: Chisholm v. Ben, 7 B. Mon. (Ky.) 408. We need not examine this subject in the case at bar. Although there is some circumstantial evidence which might create a suspicion that the St. Louis will came into the bank at Falls City, where Joseph H. Miles would have had access to it, we do not think there is enough to call for application of the authorities referred to, even if we were prepared to follow them: Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; Collyer v. Collyer, 110 N. Y. 468 481, 6 Am. St. Rep. 405, 18 N. E. 110. But if we take it that the St. Louis will, assuming that there was one, remained in the custody of the testator, it does not follow that such will must be regarded as revoked. The presumption of destruction animo revocandi is one of fact only. It governs in the absence of circumstances tending to a different conclusion, but may be overcome by circumstantial or other evidence to the contrary: 1 Jarman on Wills, 5th ed., *133; Legare v. Ashe, 1 Bay (S. C.), 464; Davis v. Sigourney, 8 Met. (Mass.) 487; Minkler v. Minkler, 14 Vt. 125; Gardner v. Gardner, 177 Pa. St. 218, 35 Atl. 558. And declarations of the testator subsequent to the execution of the will are admissible for this purpose: Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460; Harring v. Allen, 25 Mich. 505; McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336; Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep 820, 25 N. E. 209; Gardner v. Gardner, 177 Pa. St. 218, 35 Atl. 558. In the analogous case of a will found among the testator's papers in a mutilated condition, declarations of the testator manifesting goodwill toward the beneficiaries, showing a purpose of adhering to its provisions, or that he is entirely satisfied therewith, will be received to rebut the pre-

sumption of revocation: 1 Underhill on Wills, sec. 232. In the case at bar, the declarations of the testator indicating that he had made and was adhering to dispositions not to be found in the Rulo will are numerous and well authenticated. Moreover, there are circumstances in evidence which would indicate that, in case there was a will subsequent to the Rulo will, it represented the final intentions of the testator. But even if we held that the St. Louis will, if there was one, was destroyed animo revocandi, would it follow that a former will, revoked by the St. Louis will, was revived by destruction of the latter? This raises a question of some difficulty, which has given rise to no little discussion.

Our statute of wills follows the Massachusetts act of 1836, which, as to execution and revocation, is modeled on the statute of frauds. We have not adopted a modern [469] statute along the lines of the English statute of 1837. Hence the question must be settled in this state without reference to the later statutes, and decisions thereunder, except as they indicate a sound policy, in accord with the general objects and purposes of every statute on the subject. If the first will is destroyed, and a subsequent will is revoked or canceled, it has never been asserted that the first will is revived. But if the first will remains in existence, and a second will, which operated to revoke it, is afterward revoked or canceled, without execution of a new one, there has been much divergence of opinion. Lord Mansfield announced a rule, which was followed by the common-law courts, when questions as to wills disposing of real property came before them, to the effect that if the first will is preserved, and a subsequent will, revoking it expressly or by implication, is destroyed or canceled, the revocation is repealed, and the original will revived and continued in force by virtue of these circumstances: Harwood v. Goodright, 1 Cowp. (Eng.) 87, 91; Goodright v. Glazier, 4 Burr (Eng.), 2512. On the other hand, the ecclesiastical courts, which had jurisdiction over wills disposing of personalty, and from whose decisions our law of probate and administration is derived in large part, held to a more flexible rule, endeavoring in each case to ascertain the intestor's intention, and making that intention the criterion. In a leading case, the doctrine of those courts was stated thus: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancellation of a later revocatory, will. Hav-

ing furnished this principle, the law withdraws altogether, and leaves the question, as one of intention purely, and open to a decision either way, solely according to facts and circumstances": Usticke v. Bawden, 2 Add. Ecc. (Eng.) 116. Counsel urge that chapter 15a of the Compiled Statutes (Annotated Statutes, 6950), which makes the common law of England the rule of decision in all cases not governed by constitution or statutes, so far as applicable, requires us to follow the rule announced [470] by Lord Mansfield, and that the decisions of common-law courts in England prior to the Revolution are controlling, as between such decisions and subsequent English authorities. We are unable to assent to this proposition.

What is the meaning of the term "common law of England," as used in chapter 15a of the Compiled Statutes? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require: Renssalaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587. "We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law—they are only evidence of law": Forbes v. Scannell, 13 Cal. 242, 285. On this ground it was held, in Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830, that a statutory provision in Washington, making the common law of England the rule of decision in all courts, did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the

understanding of this court from the beginning. What Sir Frederick Pollock has called [471] "the immemorial and yet freshly growing fabric of the common law," is to be our guide, not the decisions of any particular courts, at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.

If, as between the rule of the old common-law courts and the rule of the English ecclesiastical courts, we are not required by statute to follow the former, we think the latter, on principle, greatly to be preferred; and it has the support of the weight of recent authority in America. A distinction was suggested at an early period between a will which revokes the former will expressly and one which so operates by implication only. Leaving the question somewhat in doubt as to the latter case, the rule has been generally and vigorously assailed as to the former: 1 Powell on Devises, 528; 4 Kent's Commentaries, 531; Randolph & Talcott's note to 1 Jarman on Wills, *193; Barksdale v. Hopkins, 23 Ga. 332; Beaumont v. Keim, 50 Mo. 28; Colvin v. Warford, 20 Md. 357; Scott v. Fink, 45 Mich. 241, 7 N. E. 799; Cheever v. North, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. 455, 37 L. R. A. 561. But the courts are by no means agreed on this distinction, and it has been considered as having no more force than to affect the presumption, if any there is: Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Schouler on Wills, sec. 413. A few jurisdictions adhere to the rule as stated by Lord Mansfield: Taylor v. Taylor, 2 Nott & McC. (S. C.) 482; Randall v. Beatty, 31 N. J. Eq. 643; Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685. But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts, and hold that if the testator destroys a subsequent will, [472] revoking a former one either expressly or by implication, such act, of itself, will not revive the former will; In re Gould's Will,

72 Vt. 316, 47 Atl. 1082; McClure v. McClure, 86 Tenn. 173, 6 S. W. 44; Harwell v. Lively, 30 Ga. 315, 76 Am. Dec. 649; Bohanon v. Walcot, 1 How. (Miss.) 336, 29 Am. Dec. 631; 1 Woerner on Probate and Administration, sec. 51. Following the English act of 1837, the statutes, wherever this subject has been dealt with by legislation, are all against the doctrine of constructive revival of the prior will. Hence we may well regard Lord Mansfield's rule as disapproved. and the doctrine of the ecclesiastical courts as vindicated. Preferring the latter, we think the rule should be to look to the intention of the testator in every case. Whether the former will is revived depends upon his intention, which is to be deduced from all the circumstances: Williams v. Williams, 142 Mass. 515, 8 N. E. 424. So far as there is a presumption, it would seem that the presumption ought to be against revivor: In re Gould's Will, 72 Vt. 316, 320, 47 Atl. 1082; Schouler on Wills, sec. 413. Without regard to any presumption, however, we find nothing in the evidence sufficient to indicate an intention to revive the earlier will, if it had been revoked, and there is much to show that no such intention existed.

It follows that we are brought inevitably to the questions whether execution of the St. Louis will has been shown sufficiently, and, if so, whether the evidence shows sufficiently that it revoked the former will, expressly or by implication. Before taking up these questions, however, certain preliminary objections going to the mode of proof must be disposed of.

It is urged on behalf of the appellees that it is not sufficient to show a subsequent will revoking the instrument probated, but that the contents of such will must be established; that declarations of the testator are not admissible to prove the later will; that persons who would take as heirs or next of kin in case of intestacy, or as beneficiaries under the subsequent will, are not competent witnesses to transactions and conversations with the deceased; and [473] that appellants must fail because they have not proved an attestation clause nor established the contents thereof. As will be seen presently, the first and second of these objections have other phases, in which they are well taken. It must be shown not merely that there was another will, but also that it contained a revocation clause, or else its contents must be established so as to demonstrate an in-

consistency between the instruments requiring the court to hold the one revoked by the other by implication. And the contents, whether with respect to the revocation clause or the general provisions from which revocation is to be implied, cannot be shown solely by declarations of the testator. But further than this we cannot accept counsel's contentions. A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating probate of such prior will, although, by reason of its loss or destruction, the exact dispositions made therein cannot be shown, and are incapable of execution. It is enough to prove that the lost will revoked the former one. If that much is shown, the contents need not be proved further: Brown v. Brown, 8 El. & Bl. (Eng.) 876; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158; Barksdale v. Hopkins, 23 Ga. 332. The revocation will be effectual, even though in other respects the will cannot be carried out: In re Cunningham, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269; Stevens v. Hope, 52 Mich. 65, 17 N. W. 698. If the later will was destroyed by the testator, intending to revoke it, yet he may have intended to die intestate: Legare v. Ashe, 1 Bay (S. C.), 464; Schouler on Wills, sec. 412. Consequently proof is admitted to show execution of the subsequent will, and that it revoked the former, and this proof may be by parol: Brown v. Brown, 8 El. & Bl. 876. But the burden is upon those who attack the earlier will to show that it was revoked; and, if they do not establish an express revocation clause, conjecture or probabilities are not sufficient; nor will such words as "this is my last will" have any weight whatever: 1 Jarman on Wills, *174; Leslie v. Leslie, 6 Ir. R. Eq. 332. As to the declarations of [474] the testator, we must distinguish between their competency and their sufficiency, when standing alone, to prove the contents of the lost will. The contents of a lost will cannot be proved solely by the declarations of the testator: Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433. But in the same case, it was held that such declarations are admissible to corroborate more direct evidence of the contents of the will, and, of themselves, are competent to prove its existence. The court said (page 298): "We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will and in proof of issues relating to the testator's competency or to

undue influence, but it has been doubted whether such declarations may be received to establish a revocation. It follows that in all proceedings to probate a lost will, such declarations are admissible in evidence because the existence of the will must necessarily be established by some such indirect method. The declarations having been admitted for that purpose, their sufficiency to establish the contents of the will is another question.'' The suggestion of doubt whether such declarations may be received to establish a revocation has reference to the fact that a mere intention to revoke is not sufficient, unless carried out in some one of the forms required by the statute. If a new will is made, without an express revocation clause, revocation is a question of intention, to be determined from the instruments themselves and from all the circumstances. If the subsequent will is lost, then, its tenor being shown, declarations are admissible in corroboration. But an intention to revoke in some other manner must be manifested by some act prescribed in the statute, and performed as the statute requires: Belshaw v. Chitwood, 141 Ind. 377, 40 N. E. 908; Meeker v. Boylan, 28 N. J. L. 274; McCune v. House, 8 Ohio, 144, 31 Am. Dec. 438; Brown v. Thorndike, 15 Pick. (Mass.) 388. The court evidently had this rule in mind, in Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433, and was not speaking with respect to such a question as that now before us. As to the competency of the testimony of those witnesses who would take [475] but for the Rulo will, the case of McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665, is decisive. In that case it was held that persons who would take as heirs or next of kin in case of intestacy are not disqualified, under section 239 of the Code of Civil Procedure, from testifying as to transactions and conversations with the deceased in a contest over an alleged will. We think, however, that in such cases evidence as to declarations of the testator should be scrutinized carefully and weighed cautiously: Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; 1 Greenleaf on Evidence, sec. 200. As to the attestation clause, if the instrument was in fact signed, attested, and subscribed, as required by the statute, a formal clause reciting the details of the transaction was not necessary. The statute does not require an attestation clause, but only requires that the will be subscribed by the testator, and attested and subscribed in his presence by two or more cred-

ible witnesses. The necessary facts may be proved by the subscribing witnesses, although the attestation clause is omitted: Robinson v. Brewster, 140 Ill. 649, 656, 33 Am. St. Rep. 265, 30 N. E. 683; Berberet v. Berberet, 131 Mo. 399, 52 Am. St. Rep. 634, 33 S. W. 61; In re Lewis' Will, 51 Wis. 101, 7 N. W. 829; Ela v. Edwards, 16 Gray (Mass.), 91; More v. More, 92 Ill. App. 465. Hence the subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the required manner, without proving that there was an attestation clause or establishing the contents thereof.

Without going over the details, we may say that the evidence produces a strong conviction that a will of some sort was made at St. Louis. There is not only the testimony of the two subscribing witnesses, but a very considerable mass of circumstantial evidence. Moreover, the declarations of the testator are well authenticated and circumstantial. Taking all these matters into account, and bearing in mind that the apparent injustice of the disposition made in the instrument admitted to probate, the suspicious character of many things connected with the finding of the Rulo will, and the disposition of the testator [476] to make wills, as shown in evidence, if the questions were merely whether a subsequent will was executed, we should hesitate to say that the decree could stand. The testimony of several of the most important witnesses was taken by deposition, and, as the trial court neither saw nor heard these witnesses, the ordinary rule that a decree based on conflicting testimony will be affirmed does not apply with full force: Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500; Delorac v. Conna, 29 Neb. 791, 46 N. W. 255. But the appellants have much more to do than merely to prove that a subsequent will was executed at St. Louis in the prescribed legal form. They must show that the St. Louis will revoked the former will, and to that extent must prove its contents.

A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property: 1 Jarman on Wills, *172. Hence, to show that the Rulo will was superseded, it would be necessary to prove that the later instrument revoked it expressly, or else to show that the contents of the later instrument were such

as to revoke it by implication. There is no proof of an express revocation clause. To show revocation by implication requires more detailed evidence as to the contents of the lost will, for, unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later: 1 Jarman on Wills, *175. The governing principle is the intention of the testator. It does not follow from the fact of a new will that full and entire revocation was intended; the purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior dispositions only. Hence a complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together: Brant v. Wilson, 8 Cow. (N. Y.) 56; Smith v. McChesney, 15 N. J. Eq. 359; In re Venable's 477 Will, 127 N. C. 344, 37 S. E. 465. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments: Schouler on Wills, sec. 407; 1 Underhill on Wills, sec. 251. There are cases where, from the whole instrument, the court is able to say that the later was intended as an independent and final disposition of the testator's property: 1 Jarman on Wills, *175. But in order that a court may do this, with assurance, it must have the later instrument before it, so that the testator's language may be fully and accurately apprehended. Hence it was held in a number of early cases that it was not enough to find the existence of a subsequent will, but it must be found that the subsequent will differed from the former will, claimed to have been revoked, and that the nature of the difference must be found also: Seymor v. Northworthy, Hard. (Eng.) 374; Goodright v. Harwood, 3 Wils. (Eng.) 497; Harwood v. Goodright, 1 Cowp. (Eng.) 87, 89, 91. This rule has been adhered to. We may regard it as well settled that the mere fact that a subsequent will was made is not sufficient, of itself, and without some proof of its actual contents, to show revocation of a former will: 1 Williams on Executors, 162, 166; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393. We think the same considerations justify the requirement that

the contents of the lost will, to such extent as is necessary to establish a revocation by implication, be clearly shown. Where parol evidence is relied on to show that a will in existence was revoked by implication by one which cannot be found, such evidence should be clear, unequivocal, and convincing, since a construction of the two, if both were actually before the court, might harmonize in whole or in part what, from the relation of those who speak from recollection of matters more or less distant in time, would appear inconsistent: Southworth v. Adams, 11 Biss. (U. S. C. C.) 256, Fed. Cas. No. 13,194; Grant v. Grant, 1 Sand. Ch. (N. Y.) 235; Newell v. Homer, 120 Mass. 277. In somewhat analogous cases, where a deed absolute is sought to [478] be proved a mortgage, or a deed is sought to be reformed, or a trust established contrary to the terms of a written instrument, by parol, this court has uniformly insisted that the evidence be clear and convincing: Doane v. Dunham, 64 Neb. 135, 89 N. W. 640, and cases cited; Topping v. Jeanette, 64 Neb. 834, 90 N. W. 911; Columbia Nat. Bank v. Baldwin, 64 Neb. 732, 90 N. W. 890. This requirement is the more salutary where the evidence goes largely to declarations of a testator. In Clark v. Turner, 50 Neb. 290, 302, 69 N. W. 843, 38 L. R. A. 433, the court say: "On no subject perhaps are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear and convincing. As said by the supreme court of the United States in Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203, 'the courts of justice lend a very unwilling ear to statements of what dead men have said.' Such evidence is always considered dangerous and subject to the closest scrutiny."

In view of the principles last discussed, we think the appellants have failed to show sufficiently that the Rulo will was revoked. Declarations of the testator alone will not suffice to show that the St. Louis will had that effect by implication, since, without showing the contents of that will, such a revocation cannot be established. But, as held in Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433, the testimony of the subscribing witnesses in this case, except so far as they testify that the testator

signed a paper, and they witnessed it in his presence and at his request, amounts only to evidence of his declaration that the paper was his will. The other testimony consists of declarations of the testator as to what he had done for or had left supposed beneficiaries of the lost will, or what would be their circumstances after his death. Beyond the declarations of the testator, which may supplement but cannot entirely replace more direct proof, there is no such clear, unequivocal and convincing evidence of the contents of the will as the [479] law must and does require. As there is no proof of an express revocation clause, it follows that the finding of the trial court is right.

We therefore recommend that the decree be affirmed.

Barnes and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A motion for a rehearing was made and denied. The opinion thereon, filed July 3, 1903, did not, in any respect, modify the original opinion.

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I. Scope of Note.

The English and earlier American authorities on the subject of this note were considered in the monographic note attached to Tynan v. Paschal, 84 Am. Dec. 628; hence we shall confine our discussion of the subject in this note to the more recent authorities.

II. General Status of Lost or Destroyed Wills.

A properly executed will, which has not been revoked by the testator, retains its validity even though it cannot be found or has been destroyed, provided, of course, that its destruction was not animo revocandi: In re Johnson's Will, 40 Conn. 587; In re Payne's Will, 4 T. B. Mon. 422; Steele v. Price, 5 B. Mon. 58.

As was said by the court in Foster's Appeal, 87 Pa. St. 67, 30 Am. Rep. 340, in speaking on this subject: "The will then being in existence at the death of the testator unrevoked by him, its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, a note or bond, or a record. The contents, therefore, may be proved in like manner, as shown by the authorities cited. It is a postulate of the question that the testator left behind him at death a last will in writing, legally executed and published, and unrevoked by any act or direction of his. That the law will not tolerate any making of a will for him by other means than his own act in writing duly executed is clear. But such a will having a legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity, in this respect, than the restoration by parol evidence of other instruments equally solemn and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act, to prevent his intentions from being frustrated or defrauded."

III. Presumptions Arising from Inability to Find Will Which was in the Possession of Testator.

The law never presumes the existence of a will in the absence of proof: Augustus v. Graves, 9 Barb. 595. But where a will is proved to have once existed and the will was in the possession of the testator, or where he had ready access to it, the presumption arises

that it was destroyed animo revocandi where it cannot be found after the testator's death: Jaques v. Horton, 76 Ala. 238; Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500; Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140; Minor v. Guthrie (Ky.), 4 S. W. 179; Davis v. Sigourney, 8 Met. 487; Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389; Williams v. Miles, 68 Neb. 463, ante, p. 431, 94 N. W. 705, 96 N. W. 151; In re Willitt's Estate (N. J. Eq.), 46 Atl. 519; Hard v. Ashley, 88 Hun, 103, 34 N. Y. Supp. 583; Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; Gardner v. Gardner, 177 Pa. St. 218, 35 Atl. 558; In re Bell's Estate, 13 S. Dak. 475, 83 N. W. 566; McElroy v. Phink, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025; Minkler v. Minkler's Estate, 14 Vt. 125; Appling v. Eades, 1 Gratt. 286; Jamison v. Snyder, 79 Wis. 286, 48 N. W. 261. Hence if the evidence shows that a lost will was last seen in the possession of the testator when he was mentally competent, it is presumed that he destroyed it animo revocandi, and the burden of proof is on the proponent to overcome this presumption: In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248.

And it has been observed that: "It is therefore a natural presumption merely because it cannot be supposed the testator would part with it unless he intended to put it out of the way, and because it is out of the way and cannot be accounted for, the presumption that he intended to revoke it arises. Like other natural presumptions drawn from evidence and not declared de jure, for some legal end, it must give way to stronger evidence of the continued existence of the will and the testator's reliance upon it as the disposition he had made of his property": Foster's Appeal, 87 Pa. St. 67, 30 Am. Rep. 340.

But, on the other hand, where the will was not in the custody of the testator, the fact that it cannot be found raises no presumption that he destroyed it animo revocandi: Coddington v. Jenner, 57 N. J. Eq. 528, 41 Atl. 874; In re Gardner's Estate, 164 Pa. St. 420, 30 Atl. 300; Harris v. Harris, 10 Wash. 555, 39 Pac. 148; In re Steinke's Will, 95 Wis. 121, 70 N. W. 61.

IV. Necessity to Rebut the Presumption of Revocation.

This presumption of revocation arising from the inability to find a will which had been in the possession of the testator is, of course, a rebuttable one: Davis v. Sigourney, 8 Met. 487; In re Willitt's Estate (N. J. Eq.), 46 Atl. 519; Minkler v. Minkler's Estate, 14 Vt. 125. The burden of rebutting this presumption is upon the proponent of the lost will: Jaques v. Horton, 76 Ala. 238; Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500. And in order to overcome it, the proponent of the lost or destroyed will must prove that the testator did not destroy the will animo revocandi, and that he died believing it to be in existence: Gardner v. Gardner, 177 Pa. St. 218, 35 Atl. 588; or by showing that it was improperly or fraudulently destroyed during the lifetime of the testator: Idley v. Bowen, 11 Wend. 227.

Declarations of the testator having a tendency to show that if he destroyed it, he did so without intent of revoking it, as by accident or mistake, or, on the other hand, that he did so with an intent to revoke it, are admissible on the question of whether the will was destroyed animo revocandi: Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820; In re Steinke's Will, 95 Wis. 121, 70 N. W. 61; monographic note to In re Colbert's Estate, 107 Am. St. Rep. 468.

The presumption of revocation may also be rebutted by circumstantial evidence: Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209. Thus where the testator was careless about his papers, and his wife, who was cut off in the will, was present during several days prior to his death while he was unconscious, and had access to his papers, and she refused to deliver up his papers until an action was brought for that purpose, it was held sufficient to rebut the presumption of revocation arising from the fact that the will was last known to have been in the possession of the testator: Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395. Likewise, where the will was in the possession of the attorney who drew it, the presumption of revocation may be overcome by showing that it was burned while in the possession of the attorney by reason of his place being destroyed by fire: Codington v. Jenner, 57 N. J. Eq. 528, 41 Atl. 874.

V. Distinction Where the Will was Lost or Destroyed Before and Where After the Death of the Testator.

Where a will was lost or destroyed after the death of the testator, it is necessary to show that it was in existence at the time of his death, but where the will was lost or destroyed before his death, it is necessary to show that it was destroyed without testator's knowledge or consent: Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130. But in some of the states, as, for instance, in California and New York, the matter is regulated by statute, to the effect that a lost or destroyed will, in order to be probated, must be proved to have been in existence at the time of the death of the testator, or shown to have been fraudulently destroyed in the lifetime of the testator: Estate of Kidder, 57 Cal. 282; Estate of Johnson, 134 Cal. 662, 66 Pac. 847; Timon v. Claffy, 45 Barb. 438; Schultz v. Schultz, 35 N. Y. 653, 91 Am. Dec. 88; In re Reiffeld's Will, 36 Misc. Rep. 472, 73 N. Y. Supp. 808.

And in Ohio it was held under a statute which made provisions for the probate of wills not revoked at the death of the testator, where the original will has been lost, spoliated, or destroyed subsequently to the death of the testator, but omitting any provisions respecting wills lost during the lifetime of the testator, that a will lost, spoliated, or destroyed could not be established unless it existed subsequently to the death of the testator, the court observing: "If all this legislative machinery was to establish a will lost after the death of the testator, why is it that all provision whatever is omitted

for the establishment of proof and record of a will lost before the decease of the testator? The answer is obvious: The General Assembly deemed it either impolitic, as opening the door to imposition and perjury or unnecessary, to permit wills lost or destroyed before the decease of the testator to be established. This court cannot, by construction, enlarge the terms of a statute so studiously limited and circumscribed'': Matter of Sinclair's Will, 5 Ohio St. 290.

The decisions respecting the construction of statutes of this character are not entirely satisfactory. They will be discussed in the next subdivision.

VI. Effect of Statutes Requiring Proof of Fraudulent Destruction Where Will was Destroyed in Lifetime of Testator.

In New York under a code section which allowed any will ''lost or destroyed by accident or design'' to be established the same as in the case of lost deeds, but requiring proof that the will had been in existence at the time of the death of testator or that it had been fraudulently destroyed in the lifetime of the testator, the court observed: ''That it has been lost or destroyed by accident or design is conceded, and the supreme court had therefore jurisdiction to take proof of the execution and validity of the will, and to establish the same. But the learned judges of the supreme court have supposed that it could not be established unless there was affirmative proof that the will was in existence at the time of the testator's death, or that it was shown that it was fraudulently destroyed in the testator's lifetime. Both or either of these propositions may be established, as well by circumstantial as positive evidence.

''As to the existence of the will at the time of the testator's death, we have the conceded fact of the execution of the will, and of the deposit of the same with a custodian for safekeeping. The custodian testifies that after it was delivered to him, at the time of its execution, he never parted with its possession, but locked it in a trunk, and supposed it was there at the time of the testator's death. Upon search made for it after his death, it could not be found. There is not a scintilla of evidence or a circumstance to show that the testator ever had possession of the will after its execution and delivery to the custodian. It follows, therefore, as a legal conclusion that this will was in existence at the time of his death (if not, then fraudulently destroyed or lost), in which event, it being now lost or destroyed either by accident or design, it should be established as a valid will.

''If the will was not in existence at the time of the testator's death, then it follows equally clear that it must have been fraudulently destroyed in his lifetime or lost. The fraud mentioned and referred to in this connection is a fraud upon the testator by the destruction of his will, so that he should die intestate, when he intended and meant to have disposed of his estate by will, and never evinced any change of that intent. It is undeniable from the facts in the record that either this will was in existence at the time of

the death of this testator, or that it had been destroyed in his lifetime, without his knowledge, consent or procurement, or accidentally lost. If so lost, it was done fraudulently as to him, and in judgment of law the legal results are the same precisely as if it had continued in existence up to the time of his death. In either contingency, it was his last will and testament, and its loss or destruction either by accident or design being proven, it is the duty of the court to establish it as the will of this testator'': Schultz v. Schultz, 35 N. Y. 653, 91 Am. Dec. 88.

Another view, however, of that statute had been taken in Timon v. Claffy, 45 Barb. 438, decided the previous year. It was there observed: ''The question of the fraudulent destruction of a will, under this section, must be one of fact. Fraud is never to be presumed. This is a fundamental rule. It is never to be imputed or inferred, but must be proved by satisfactory evidence.

''The fraud in the destruction of a will must consist in some deceitful contrivance, device, or practice, to defeat the wishes and intent of the testator in regard to his will. The fraud can only be alleged as against him, for during his life no one else can have any legal rights or vested interests in a will to be defrauded. No one else can be defrauded until after his death, by the destruction of his will. The testator has the unqualified right, while in the full possession of his facilities [faculties] to destroy his own will at any time, or in any mode or manner he pleases, and I cannot see how it can be alleged or held that any fraud is or can be committed by any person in destroying or assisting to destroy a will by the express direction and in the presence of the testator, though it be not done in the presence of two witnesses so as to revoke it under section 42. The refusal, therefore, of the circuit judge to instruct the jury in this case, that if this will was destroyed in the presence of James Claffy and at his request, but not in the presence of two witnesses, as required by section 42, such destruction was fraudulent, was not erroneous, and the exception to such refusal was not well taken.'' This case was followed in Re De Groot's Will, 9 N. Y. Supp. 471.

The mere fact that the testatrix, while sick and in a half-asleep condition, dropped the will which she had been examining into the fire, and that her nurse did not rescue it, does not show a ''fraudulent destruction'' under the statute requiring proof of a fraudulent destruction in order to have a lost or destroyed will probated: In re Kidder's Estate, 66 Cal. 487, 6 Pac. 326. And in a later California case it was said that in order to make the destruction of a will fraudulent within the code section, there must be the assertion of some fact not warranted by the information of the person making it. Hence, the destruction of a holographic will by a friend of the testator, as being, in the opinion of the friend, of no further use after the signing of a typewritten copy which had been suggested as a better form of will is not a fraudulent destruction, regardless of how erroneous such opinion may be, or with what degree of positive-

ness it may have been asserted: Estate of Johnson, 134 Cal. 662, 66 Pac. 847.

In an early case in the surrogate court of New York, it was stated that the destruction of a will without the knowledge or consent of the testator, in disregard of his intention, and to the injury of the person who was made the object of his bounty, is fraudulent within the meaning of the statute, though there was no fraud in the sense of an intent to benefit by it or deceive or injure anyone: Early v. Early, 5 Redf. Sur. 376. And in Re Reiffeld's Will, 36 Misc. Rep. 472, 73 N. Y. Supp. 808, the surrogate, in discussing the effect of an accidental destruction of the will of testator during his lifetime by a fire, the occurrence of which it was shown that he was informed of, said: "A will destroyed during the lifetime of a testator, in order to be admitted to probate, must be shown to have been fraudulently destroyed. 'Fraud' is defined by the Standard Dictionary in its legal aspect as 'any artifice or deception practiced to cheat, deceive or circumvent another to his injury'; (2) 'any act, omission or concealment that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another.' 'Fraudulent' is defined objectively as 'based or proceeeding from, or characterized by fraud.' 'Fraudulently' is an adverb of the same meaning, and is here used to characterize the manner of destruction intended by the statute. Here was no fraudulent destruction such as is provided for by statute, but only an accidental destruction for which no provision is made. The title to all property, real and personal, vests primarily in the sovereign state upon the death of the owner, and can only be devised or bequeathed in the manner and to the extent provided by statutes, which are to be strictly construed; so that I must determine, as a matter of law, that the accidental destruction of this instrument now offered for probate was fraudulent. I am unable to arrive at such a conclusion. The authorities referred to by the proponent do not, in my judgment, so decide. The will was destroyed accidentally, without the consent or knowledge of the testator; and by a failure to admit this instrument to probate, a different disposition will be made of his property than he intended. As I construe the statute, and construe the term 'fraudulently' as applicable thereto, it appears to me that, in order to come within the lines thereof, there must be some intervening human agency in motion, or set in motion, to have brought about its destruction. I am unable to see how the mere accidental destruction of this instrument through the fault of no one, through the active agency of no one, can be construed or deemed of such a fraudulent character as to permit of the application of the statute."

VII. What Constitutes a Fraudulent Destruction of the Will.

a. In General.—Where a will was in testator's desk after his death, and a few days later it cannot be found, and there are marks of violence upon the desk showing the lock to have been broken open, a spoliation is shown, and it is not necessary for the proponents of

the destroyed will to be able to designate the person who carried the will away: Bailey v. Stiles, 2 N. J. Eq. 220. And where a will devising the estate to the fiancé of testatrix was destroyed on the day of her death, by her brother burning it in the presence of several persons, but not in the presence of the testatrix, and under circumstances indicating stealth, the testatrix having declared repeatedly up to the morning of her death, that she had not changed her mind with respect to devising her estate to her fiancé it was held that the facts showed an actual fraudulent destruction of her will during her lifetime: In re De Groot's Will, 9 N. Y. Supp. 471.

Declarations of an heir of the testator, who is not a party to the record, to the effect that he destroyed the will after the testator's death, are merely hearsay and not admissible as against other persons interested in the case: Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500.

b. Effect of Mere Opportunity to Destroy the Will as Evidence of Fraudulent Destruction.—The mere fact that several persons had opportunities to destroy the will nad they seen fit to do so is no evidence to establish a fraudulent destruction of the will: Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; In re Kennedy's Will, 53 App. Div. 105, 65 N. Y. Supp. 879. Hence the mere opportunity to destroy the will on the part of interested persons is not sufficient to rebut the presumption that the testator destroyed it for the purpose of revoking it: Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500. In speaking on this subject, the court in Bauskett v. Keitt, 22 S. C. 187, said: "In this case there was no allegation or evidence tending to show that the will had been destroyed by accident, but the whole case of the plaintiffs depended upon their being able to show that the will was destroyed by the heirs at law, because it was to their interest so to do. This would have been a criminal act on their part, and, to establish it, there must be evidence satisfactory to the tribunal (in this case the jury) intrusted with the trial of the issue. Indeed, the very ground upon which the rule is based, that where a will is traced to the possession of the testator, and it cannot be found after his death, the presumption is that the testator himself revoked it, is that the law will presume that an innocent, rather than a criminal, act has been done. Hence, in such a case, the law will presume that the will was destroyed by the testator, which would be an innocent act, rather than that it was destroyed by the heirs at law, even though they might have an interest so to do, and might, by reason of their close relations to the testator, have the best of opportunities of so doing; because if they did it, their act would be a criminal one, which the law will not presume, but will require to be established by satisfactory evidence."

But the presumption of revocation by the testator does not arise where the will was in the possession of one whose interests would not be subserved by the provisions of the will. Thus in McElroy v.

Phink, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025, the court said: "The authorities are practically in accord upon the proposition that where a will which, when last seen, was in the custody of the testator, cannot be found after his death, a presumption arises that it has been revoked. The proposition is evidently based upon the theory that it is a reasonable inference from the facts that the custodian, who in such case is the testator, has destroyed it for the purpose of revoking it. On the other hand, there is authority for holding that when at last accounts the will was in the hands of some one other than the testator—and especially in the possession of one to whose interest its provisions are adverse—the presumption of its destruction by the testator does not arise from the mere fact that it cannot be produced. It may be that, if the will is shown to have been destroyed, it would not be presumed that it was the act of some one other than the testator, for the reason, as given by the English courts, that it would not be presumed that the custodian had committed a crime. But in this case the testimony traces the will, when last seen, into the possession of the husband of the testatrix; and it also appears therefrom that by the instrument all her property was devised to the proponent, and that the husband was an heir to her estate. It does not show that the will was destroyed. It is merely shown that it could not be found. It may be that it has been lost. While it may not be permissible to infer that the husband had destroyed it, there is room for the presumption that he may have lost it. It is no offense against the law to lose an instrument in writing, and therefore it is not necessary to determine in this case whether to destroy the will of another, without authority to do so, is under our law, where all penal offenses are defined by statute, a criminal act or not. Therefore, we think that under the evidence adduced in this case, according to the rule generally recognized by the courts, the trial judge was at least authorized to find, as he did find, that the will had not been revoked." Still, the fact that the contestant of the lost will had an opportunity to destroy the will is a circumstance which may be considered with other proof on the question of overcoming the presumption that the will was destroyed by the testator: Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395.

c. Right to Show Use of Undue Influence in Procuring Destruction of the Will.—To prove that the destruction of a will was procured by undue influence, evidence showing what took place in the sick-room between the time that the will was sent for and its being brought to testator, who then destroyed it, is admissible as part of the res gestae: Batton v. Watson, 13 Ga. 63, 58 Am. Dec. 504.

VIII. General Requirements of What must be Shown with Respect to the Lost or Destroyed Will.

Where it sought to prove the substance of a will not produced for probate, it is incumbent on the proponent to establish the fact that this testator made a valid will; the contents or substance of the will, or of such portion as might be recorded as his will; and that the will,

though not in existence at his death, had not been revoked by him: Chisholm v. Ben, 7 B. Mon. 408. But frequently the statute prescribes what must be proved with respect to lost or destroyed wills, as in California, New York, and Ohio: Estate of Johnson, 134 Cal. 662, 66 Pac. 847; Harris v. Harris, 26 N. Y. 433; In re Sinclair's Will, 5 Ohio St. 290. Likewise in establishing a holographic will, it is necessary to prove all the essentials of a holographic will: Lucas v. Brooks, 23 La. Ann. 117; Fuentes v. Gaines, 25 La. Ann. 85.

The proponent of a lost will must prove that the will was actually in existence at the time of the testator's death or that it is in existence in contemplation of law: Kotz v. Belz, 178 Ill. 434, 53 N. E. 367; In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248. And where the mental incapacity of the testator to revoke the lost will is relied upon, it is not sufficient to show that the will may have been in existence after the time that the mind of the testator became impaired, but its actual existence after that time must be shown: Shacklett v. Roller, 97 Va. 639, 34 S. E. 492.

And, of course, one seeking to establish a lost or destroyed will has the burden of proving that it was not destroyed by the testator with intent to revoke it: McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611.

IX. Right to Stipulate or Make Admissions Respecting the Execution or Contents of the Lost Will.

A lost or destroyed will cannot be admitted to probate on a stipulation of counsel as to its contents: Matter of Ruser, 6 Dem. Sur. 31. And an admission upon the record that a paper had been duly executed as the last will and testament of the deceased does not dispense with the production of the testimony required by law to prove the execution thereof: Hylton v. Hylton, 1 Gratt. 161.

X. Necessity for Institution of a Search for the Missing Will.

To entitle a party to give parol evidence of the contents of a lost will, where there is no conclusive evidence of its destruction, it must be shown that diligent search has been made in those places where it would be most probably found: Bryan v. Walton, 14 Ga. 185; Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395. Hence where a known will which, after being sent for by the testator, to be destroyed, was declared by the testator to have been destroyed, it is proper to search for it among the papers of the testator, although the presumption arises that it was destroyed: Bulkley v. Redmond, 2 Bradf. Sur. 281. But search for a will after the death of the testator need not be shown where it is claimed that the will was fraudulently destroyed after such death and there is evidence to support such claim: Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812.

XI. General Character of Evidence Admissible to Establish Lost or Destroyed Wills.

a. In General.—The best evidence which the nature of the case will admit of is admissible to prove the contents of a lost or de-

stroyed will, but where the best evidence is not obtainable, a resort may be had to secondary evidence: Davis v. Sigourney, 8 Met. 487; Apperson v. Dowdy, 82 Va. 776, 1 S. E. 105; Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395; Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194. Hence, it is said that where a will is lost or destroyed, as in the case of a deed, the next best evidence of its execution and contents is admissible, but it is also observed that "the proof of the loss being addressed exclusively to the court and for the satisfaction of the judge, need not be as strict and technical as is required by the general rules of evidence": Fetherly v. Waggoner, 11 Wend. 599. In Jaques v. Horton, 76 Ala. 238, the court, in discussing the admissibility and weight of secondary evidence to prove a lost will, said: "While the doctrine that there are no degrees in secondary evidence has not prevailed to its fullest extent, in this state, we are not prepared to adopt a stringent extension of the rule, which excludes all secondary, until the absence of the primary evidence is accounted for, to secondary evidence. Where the secondary evidence offered, ex natura rei, supposes a higher degree of secondary evidence, the best should be produced. 'But, where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not admissible by other rules of law, unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud which the law itself presumes when primary evidence is withheld.' When a certified or examined copy of a paper required to be recorded, or a letter-press copy of a writing is shown to be in existence, it is better evidence than the memoriter statements of a witness, and its production should be demanded: 1 Greenleaf on Evidence, sec. 84n; Cornett v. Williams, 20 Wall. 226, 22 L. ed. 254."

And in an early case in Virginia, it was said with respect to the admission of parol evidence of the contents of a will, the probate records of which were destroyed during the war of the Revolution, that: "The rule is, that the best evidence that the nature of the case will admit of is to be received. On this principle, I think the evidence was admissible, though parol proof of the contents of an instrument must be generally very defective (it being seldom possible, after a lapse of time, that the witness can recollect the precise expressions in it, or their collocation, on which its meaning often depends), yet in aid of a long and continued possession in the defendants, and those under whom they claim, such testimony may be resorted to. It is the best evidence the nature of the case will admit of": Smith v. Carter, 3 Rand. 167. Hence the contents of a lost will may be proved by parol evidence: In re Lane's Will, 2 Dana, 106; Lucas v. Brooke, 23 La. Ann. 117; Legare v. Ashe, 1 Bay (S. C.), 464. And likewise the existence or loss of the will may be shown by circumstantial evidence: Schultz v. Schultz, 35 N. Y. 653, 91 Am. Dec. 88; Harris v. Harris, 10 Wash. 555, 39 Pac. 148. So, also, the presumption of revocation may be rebutted by either direct or cir-

cumstantial evidence: Matter of Johnson's Will, 40 Conn. 587. And it is even held that evidence of testator's character is admissible to show his tenacity of purpose and thus affect the probability of his revoking his will: Brown v. Brown, 10 Yerg. 84.

b. Admissibility of Declarations of Testator.—Inasmuch as the question of the admissibility of the declarations of a testator on an application to probate a lost will has been treated in the very recent monographic note attached to In re Colbert's Estate, 107 Am. St. Rep. 468, we shall not again discuss the subject. The general rule as shown by the note just referred to is that where the execution of a will is proved, and the question is whether it continued in existence unrevoked at the time of the testator's death, notwithstanding it cannot be found, his declarations are admissible either to repel or to support the presumption of its destruction and revocation.

XII. Burden of Proof Respecting Lost or Destroyed Wills.

The burden of proof on the probate of a lost or destroyed will is upon the party offering the will for probate: Newell v. Homer, 120 Mass. 277; Graham v. O'Fallon, 3 Mo. 507; Coddington v. Jenner, 57 N. J. Eq. 528, 41 Atl. 874; Harris v. Harris, 10 Wash. 555, 39 Pac. 148; Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194. Consequently, one seeking to establish a lost or destroyed will assumes the burden of overcoming, by adequate proof, the presumption that it has been destroyed animo revocandi: Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110.

In proceedings under the New York code to establish a lost or destroyed will, the burden is on the proponent of the will to show that the will was in existence at the time of the testator's death, or that it was fraudulently destroyed during his lifetime: Perry v. Perry, 66 Hun, 629, 21 N. Y. Supp. 133.

XIII. Quantum or Degree of Proof Necessary to Establish a Lost or Destroyed Will.

a. In General.—The courts are not harmonious in their characterizations of the quantum or degree of proof necessary to establish a lost or destroyed will. In Jaques v. Horton, 76 Ala. 238, the court said: "We can conceive no valid reason why there should be any difference in the quantum of proof necessary to establish the contents of a lost will, and the contents of a lost deed, or other written instrument. In either case, the proof must be satisfactory, and probably more caution should be observed in the case of a lost will, as the testator cannot be heard in respect to the disposition he has made of his estate, and as a will is required to be attested by two witnesses."

Likewise in Davis v. Sigourney, 8 Met. 487, the court observed: "To authorize the probate of a lost will by parol proof of its contents, depending on the recollection of witnesses, the evidence must be strong, positive, and free from all doubt. Courts are bound to

consider such evidence with great caution, and they cannot act on probabilities."

The different courts, however, vary in their characterizations of the proof necessary. Thus it has been said that the contents can be shown by such evidence as will satisfy the tribunal whose duty it is to decide the question: Morris v. Swaney, 7 Heisk. 591; McNeely v. Pearson (Tenn. Ch.), 42 S. W. 165. The will may be established upon satisfactory proof of its destruction and of its contents, but whether the proof be by one witness or by many, it must be clear, satisfactory and convincing: Wyckoff v. Wyckoff, 16 N. J. Eq. 401. Sometimes it is said that the evidence must be full and satisfactory: Dudley v. Wardner's Exr., 41 Vt. 59; clear and satisfactory: Matter of Johnson's Will, 40 Conn. 587; strong, positive and free from doubt: Newell v. Homer, 120 Mass. 277; Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194; clear and explicit: Buchanan v. Matlock, 8 Humph. 390, 47 Am. Dec. 622; clear, conclusive and satisfactory: Kitchens v. Kitchens, 39 Ga. 168, 99 Am. Dec. 153; or the clearest, most conclusive and satisfactory proof: Nunn v. Lynch, 73 Ark. 20, 83 S. W. 316; Rhodes v. Vinson, 9 Gill, 169, 52 Am. Dec. 685. And it is also observed that courts of equity do not set up lost wills except where it is clearly shown that it should be done: Shacklett v. Roller, 97 Va. 639, 34 S. E. 492. And in New Jersey it is said that the execution and contents must be proved with clearness and certainty: In re Willitt's Estate (N. J. Eq.), 46 Atl. 519; or that the proof must be clear and convincing: Coddington v. Jenner, 57 N. J. Eq. 528, 41 Atl. 874. So, also, it is said, that the evidence to overcome the presumption that a lost will was destroyed by the testator animo revocandi must be clear, satisfactory and convincing: In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248. And parol evidence for the purpose of showing that a former will was revoked by implication in the lost will must be clear, unequivocal and convincing: Williams v. Miles, 68 Neb. 463, ante, p. 431, 94 N. W. 705, 96 N. W. 151.

Though the evidence of the contents of a lost will must be clear, full and satisfactory, it need not be such as to remove all reasonable doubt from the minds of the jury as to the substantial parts of the instrument: Skeggs v. Horton, 82 Ala. 352, 2 South. 110.

The supreme court of California, construing a section of the code which required the provisions of the lost or destroyed will to be "clearly and distinctly proved by at least two credible witnesses," said: "This provision of the code, being remedial in its nature, is to receive a liberal construction, and is held to apply as well to a mutilated will, or one in which some of its provisions have been destroyed: Hook v. Pratt, 8 Hun, 102. The above section does not require that the witnesses shall reproduce the exact language of the testator, but that the 'provisions' of the will shall be 'clearly and distinctly proved.' If their testimony respecting the contents of the lost portion of the will coincides as to the provisions therein

made by the testator, the court is authorized to establish such provisions as a portion of the will, even though the witnesses may differ as to their remembrance of the exact language used by the testator": Estate of Camp, 134 Cal. 233, 66 Pac. 227.

b. **Degree of Proof as Against the Spoliator.**—"Where one deliberately destroys or purposely induces another to destroy a written instrument of any kind, and the contents of such instrument subsequently becomes a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon": In re Lambie's Estate, 97 Mich. 49, 56 N. W. 223.

c. **Effect of Lapse of Time on Quantum of Proof Necessary to be Adduced.**—The lapse of time naturally affects the weight of testimony respecting the contents of lost wills, and especially where the provisions of the will are alleged to have been somewhat complicated. Thus in Apperson v. Dowdy, 82 Va. 776, 1 S. E. 105, in a case of this kind, the court said: "For example, if perfect knowledge, a reasonable time, and a simple fact, be the question, and the witness reasonably intelligent, the contents might be satisfactorily proved by the recollection of the witness. Thus an intelligent witness, called upon to prove the contents of a will recently read by the witness, which devised a known tract of land to Peter Duncan, would not risk the miscarriage of justice. But in a case where a title and possession have been long enjoyed unchallenged, when such title is assailed only after the destruction of the records, by a witness who testifies to the contents of a paper she had never read, and of which she has never read an authenticated copy, and bases her knowledge upon having heard the will read, by an indifferent person, sixty-eight years before, when she was an infant, and so testifies, when she is an octogenarian, not to the devise of Peter Duncan simply, but as to the degree of estate so devised, and crowns the whole by making her (X) mark, instead of signing her name, we may well hesitate before we disturb an old title and possession upon such evidence. In this case there are many difficulties in the question as to the weight of this evidence. In 1880, could any person be expected to retain a perfect or a safe recollection of the contents of a paper read in her hearing in 1812? But when this is claimed for a young girl, who heard the paper read by a neighbor, and never heard it again for so many years, we might admit that the neighbor read the will correctly (a fact which she cannot prove), and then that she heard correctly, and yet we may well question whether her recollection is correct."

So, also, in Todd's Heirs v. Wickliffe, 12 B. Mon. 289, the court in adverting to the inconsistencies in the testimony of a witness of intelligence and fine character respecting the terms of a will which had been destroyed nearly fifty years before in the burning of a courthouse, observed that: "It all shows the frailty of human memory, and how little reliance is to be placed upon our recollection of

the language, or even the substance of a written instrument after many years have gone by. Indeed, there is scarcely a competent lawyer who will venture to advise an applicant as to the meaning and effect of any devise in a will, upon his mere statement, although he may have come recently from its perusal. Before hazarding an opinion, he will dispatch his client for the instrument or a copy."

But where a lost will is more than thirty years old, and premises devised by it have been held under it from the time of the death of the testator, very slight evidence showing its proper execution will be deemed sufficient: Fetherly v. Waggoner, 11 Wend. 599.

XIV. Effect of Number of Witnesses Testifying to the Execution or Contents.

a. In General.—In the absence of statutory provisions requiring more than one witness, the contents of a lost or destroyed will may be established by one witness: Skeggs v. Horton, 82 Ala. 352, 2 South. 110; Matter of Page, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130; Jackson v. Vickory, 1 Wend. 406, 17 Am. Dec. 522. One witness is sufficient to establish the contents of a lost page of a will: Varnon v. Varnon, 67 Mo. App. 534. The proof of execution of a will may be made by one of the subscribing witnesses only, although the will be lost and the witness has forgotten the name of one of the other subscribing witnesses: Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395. And one of the subscribing witnesses will be sufficient to prove the execution of the will if he can prove that he saw the other witnesses subscribe it in the testator's presence: Graham v. O'Fallon, 3 Mo. 507.

The testimony of a single witness that the will was wholly written and signed by the testator is sufficient to set up such will if its loss after death of the testator is shown and its contents are satisfactorily made out: Baker v. Dobyns, 4 Dana, 220. But in Louisiana, it has been held that in proving a lost holographic will, two credible persons who have often seen the testator write and sign his name, are necessary: Fuentes v. Gaines, 25 La. Ann. 85.

Perhaps the most famous case in which the contents of a complicated lost will were established by the evidence of a single witness was that of Sugden v. Lord St. Leonards, [1876] L. R. 1 P. D. 154. In that case the contents of the will were established by the daughter of the testator, who was interested as a devisee, but whose veracity was unquestioned. The witness had been the private secretary of her father, who was considered one of the ablest lawyers in England.

In Klarno v. Klarno, 4 Harr. 83, a will destroyed by an heir at law was admitted to probate on proof of its contents by one witness and the production of a rough draft, which had been found among the papers of the testator.

Where a testator having two wills in his possession, and intending to destroy the last will, by mistake destroys the first, the law does

not require proof by two witnesses in order to establish the will intended to be destroyed: Burns v. Burns, 4 Serg. & R. 295.

The court in Jacques v. Horton, 76 Ala. 238, very pertinently observed: "The testimony of a single witness who has read and remembers the contents of the will may be sufficient. Such evidence, however, should be clear and positive—not vague or uncertain recollections—and of such character 'as to leave no reasonable doubt as to the substantial parts of the paper.'"

It would seem that allowing a witness to state his mere recollection of the substance of a lost will of a complicated character is to, in effect, allow the witness to judicially construe the will without allowing his construction to be reviewed by considering whether the language employed in the will warranted the construction given by the witness. Of course, where the will made no attempt to devise the estate upon varying contingencies, it is quite likely that a non-professional witness could recollect the language employed in the will and thus obviate the liability of the witness construing the will instead of testifying to the language employed in the will.

b. Effect of Code Provisions Respecting the Number of Witnesses Necessary.—Under a code provision of Georgia, it was necessary to establish the execution of a will destroyed since the death of the testator by the three subscribing witnesses if they are alive and within the jurisdiction of the court: Kitchens v. Kitchens, 39 Ga. 168, 99 Am. Dec. 453. And under a code provision requiring in case of loss "a copy of the same clearly proved to be such by the subscribing witnesses," the existence of the will must be proved by all the subscribing witnesses: Mosely v. Carr, 70 Ga. 333. And where the statute provides that no will shall be allowed to be proved as a lost will unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a copy of the will, even if proved to be correct, is not a substitute for a credible witness, nor is the evidence of only one witness who saw but did not read the will sufficient: Harris v. Harris, 10 Wash. 555, 39 Pac. 148. So, also, under a code provision requiring two credible witnesses to the contents of a lost or destroyed will, testimony of one witness to its provisions, and to the fact that it was executed as drawn by a certain lawyer, together with testimony of the lawyer as to the provisions of the will as drawn by him, and testimony of another witness who saw the will after it was executed, but who did not remember all of its provisions, is not sufficient: In re Waldron's Will, 19 Misc. Rep. 333, 44 N. Y. Supp. 353. Under a code provision requiring that the provisions of a lost or destroyed will must be clearly proved by two credible witnesses, each of the witnesses must be able to testify as to all the disposing parts of the will: Matter of Ruser, 6 Dem. Sur. 31; Todd v. Rennick, 13 Colo. 546, 22 Pac. 898.

XV. Establishment of a Destroyed Will by Proof of Incapacity of Testator to Revoke It.

Where it is sought to establish a will destroyed by the testator on the ground that he was mentally incapable of revoking it, the court in McIntosh v. Moore, 22 Tex. Civ. 22, 53 S. W. 611, observed: "The burden of proving that he did not have such testamentary capacity at the time the will was destroyed was put upon the proponent, and it is not sufficient to show that a part of the time during the period between when the will was last seen and the time of his death, he did not possess such capacity; but it must reasonably appear from the evidence that at the time of its destruction he was lacking in testamentary capacity, for he may have been, during a part of the time that elapsed from the time when the will was last seen, and his death, incapable of revoking it, yet at the time of its destruction he may have possessed the necessary testamentary capacity." In this connection, see also, subdivision VI.

XVI. Establishment of a Lost Will Revoking a Former Will Which is Produced.

Parol evidence of the contents of a will subsequent to the one produced for probate, which subsequent will has been lost, destroyed, or canceled, is admissible to establish the revocation of the will produced: Lane v. Hill, 38 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393. Evidence of the contents of an alleged lost will relied upon as a revocation of a prior one, offered for probate, is inadmissible in the absence of evidence that it was executed in the presence of two witnesses as required by the statute: McKenna v. McMichael, 189 Pa. St. 440, 42 Atl. 14. And it must also be shown that the lost will either in express terms revoked the former will or that its provisions in devising the property were so far inconsistent with the former will that it would operate as a revocation: Caeman v. Van Harke, 33 Kan. 333, 6 Pac. 620. The evidence to oppose the probate of a will may consist in the mere proof of a revocatory clause in a later will which has been lost or destroyed, even though the proof as to the entire contents be insufficient to admit the lost will to probate: In re Cunningham, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269; Williams v. Miles, 68 Neb. 463, ante, p. 431, 94 N. W. 705, 96 N. W. 151. Where a will offered for probate was claimed to have been revoked by a later will drawn by the same attorney, testimony of the attorney who drew the will to the effect that the testatrix came to his office to have him draw the second will, whereby she desired to revoke the former will, and make certain changes in it, but, at the same time, did not desire to allow her husband, in whose hands the former will was to know of such changes, that she was anxious to have witnesses to the will, who would not speak of the fact of having witnessed the will, and that he remembered the date of the will, and the substance of the provisions, together with the testimony of the other witness to the will, a physician, who had offices next to those of the attorney, to the fact of execution, was

held sufficient to prove the lost will: In re Bell's Estate, 13 S. Dak. 475, 83 N. W. 566.

XVII. Matters Relating to the Proof of the Execution of the Lost or Destroyed Will.

a. In General.—The execution of a lost will must be shown by proof of all the statutory requirements respecting the execution of wills in the same manner as if the will had not been lost: Morell v. Morell, 157 Ind. 179, 60 N. E. 1092; Fuentes v. Gaines, 25 La. Ann. 85; Collyer v. Collyer, 4 Dem. Sur. 53; Grant v. Grant, 1 Sand. Ch. 235; In re Hitchler's Will, 25 Misc. Rep. 365, 55 N. Y. Supp. 642; In re Purdy's Will, 46 App. Div. 33, 61 N. Y. Supp. 430; Tynan v. Paschal, 27 Tex. 286, 84 Am. Dec. 619. That is, the execution of a will must be proved by the subscribing witness, as provided by law, whereas the loss or destruction of the will or its contents may be shown by any other competent evidence: Scott v. Maddox, 113 Ga. 795, 84 Am. St. Rep. 263, 39 S. E. 500.

And the burden is on the party setting up a lost will to prove its execution, as well as its contents by strong, positive and convincing testimony: Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194; Williams v. Miles, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151.

But where the evidence shows that the lost or destroyed will was in the possession of a party interested in its suppression, a presumption arises that it was executed in the form prescribed by law: Anderson v. Irwin, 101 Ill. 411; In re Lambie's Estate, 97 Mich. 49, 56 N. W. 223. On the question as to the admissibility of declarations of the testator to prove the fact of execution of the lost will, see the monographic note to In re Colbert's Estate, 107 Am. St. Rep. 460.

b. Necessity to Call All the Subscribing Witnesses to Prove the Execution.—Where all the subscribing witnesses to a lost will are within the jurisdiction of the court, they must be called. In such a case they are not the witnesses of either party, but of the court. But where one of the witnesses is dead, and another has removed beyond the jurisdiction of the court, the rule does not apply: Bailey v. Stiles, 2 N. J. Eq. 220.

c. Effect of Inability of Subscribing Witness to Recollect Facts Respecting the Execution.—Testimony of one subscribing witness that the lost will was executed in his presence, that of another named person, and another person whose name he could not recollect, but whom he knew to be a credible witness, is sufficient evidence of the proper execution of the lost will: Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395. And where one witness testified that he had no recollection of seeing the testator sign the will in the presence of the subscribing witnesses, but another witness (testator's wife), testified affirmatively that he did sign, in their presence, the court observed: "The rule of law is clear in such case; the affirmative witness must

prevail. There is one consideration here worthy of being noticed. The will was executed in the year 1829, and the witnesses were examined in 1835. A period of six years had passed, and it would be no very strange occurrence that even a subscribing witness should not remember everything that took place at the time of the execution. Mr. Johnson, although evidently a very accurate witness, and, judging from his testimony, a cautious and just man, had no interest or feeling in this transaction. The wife of the testator was his nurse, was present, held him up in the bed, and was greatly interested, no doubt, at the time, in all that was passing. The witness not only swears that her husband signed the will in the presence of the witnesses, but states all the circumstances. While the proof is not as full on this point as I could have wished, yet by the rules of law as well as from the whole tenor of the evidence, I must declare the proof in the case to be that the will was signed by the testator in the presence of the witnesses'': Bailey v. Stiles, 2 N. J. Eq. 220.

But where the scrivener, who produced a draft of the lost will, containing neither the name of the testator nor the names of the witnesses, could not positively testify whether he was a subscribing witness, but thought that he was, but could not state whom the other witnesses were, the proof was regarded as insufficient to allow the will to probate: Collyer v. Collyer, 4 Dem. Sur. 53.

d. Effect of Evidence of Scrivener as to His Habit Respecting the Performance of the Execution Formalities.—Testimony of an attorney that he drew the will, but could not recollect who witnessed it, though he was in the habit of witnessing such wills himself, and having his clerk, if present, also witness them, together with like testimony from his clerk, except that the clerk had an impression, but no certainty, that he and the attorney witnessed the will, is not satisfactory proof to establish the execution of a lost or destroyed will: Grant v. Grant, 1 Sand. Ch. 235.

XVIII. Matters Relating to the Proof of the Continued Existence of the Will or Rebuttal of the Presumption of Revocation.

Where a testatrix, a woman over seventy years of age, left her will for safekeeping with her lawyer, who placed it in his desk with other valuable papers, no one outside of his family having access to the desk, and the lawyer testifies that no one called for the will, and that he cannot find it, the presumption that the will was revoked is overcome, notwithstanding that a person benefited by its revocation testified that the testatrix threw the will in the stove with intent to destroy it, and especially where the witness so testifying had an opportunity to have taken it surreptitiously from the lawyer's desk: Hildreth v. Schillenger, 10 N. J. Eq. 196. But where the will had been drawn nine years previously and placed in the safe of the subscribing witness, who did not remember when he had last seen it, but the business partner of the witness was an intimate friend of the testator, and the testator had frequently called at the business place of the witness, and it also appeared that the testator, several

years prior to his death, had drawn another will which was a substantial copy of the earlier will, but had afterward obliterated the name of a devisee, and his own name, and the names of the subscribing witnesses, it was held to be insufficient to establish the lost will: Keesy v. Simon, 91 Hun, 642, 37 N. Y. Supp. 92.

Where a subscribing witness witnessed testator's will a few years before his death, in the presence of two other witnesses, the wife and a son of the testator, and the testator, several days before his death, had the will brought from a desk, where he kept his valuable papers, for the purpose of giving it to one of his sons for safekeeping, but changed his mind and returned the will to the desk, and his widow testifies to having seen the will the day after testator's death, the evidence is sufficient to show that the will was in existence at the time of his death: Bailey v. Stiles, 2 N. J. Eq. 220. Evidence that an alleged witness to a lost will stated at the testator's funeral that he had the will in his pocket does not tend to prove that such was the case, there being no evidence that anyone ever saw it in his possession: In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248. Proof that a month before his death testator told a witness that he had made a will, that his daughter was his housekeeper, and had an interest in destroying the will, and that three days after his death his will was not to be found, is not sufficient evidence to authorize the submission whether the will was in existence at the death of the testator: Knapp v. Knapp, 10 N. Y. 276. But where a will executed in March, 1895, was seen in testatrix's possession, in January, 1898, and the envelope containing the will was seen in a closet where testatrix kept valuable papers, on June, 11, 1898, but was not seen again, and the testatrix died on the thirty-first day of July, 1898, the presumption arises that it was destroyed animo revocandi: In re Kennedy's Will, 53 App. Div. 105, 65 N. Y. Supp. 879.

XIX. Matters Relating to the Proof of the Contents of a Lost or Destroyed Will.

a. **In General.**—Upon proof that a will has been lost, its contents may ordinarily be shown by parol in the same way as the contents of any other lost instrument: Butler v. Butler, 5 Harr. 178; Muller v. Muller, 108 Ky. 511, 56 S. W. 802; Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393; Scoggins v. Turner, 98 N. C. 135, 3 S. E. 719; Brinker v. Brinker, 7 Pa. St. 53; McNeely v. Pearson (Tenn. Ch.), 42 S. W. 165.

Whether the contents of an alleged lost will can be proved solely by the declarations of the testator is doubtful, but the fact that such declarations are admissible in connection with other evidence is quite well established: Monographic note to In re Colbert's Estate, 107 Am. St. Rep. 469.

In some of the states, however, the statutes require the provisions of lost or destroyed wills to be established by two credible witnesses: See subdivision, XIV, b.

b. How Much of a Lost or Destroyed Will Must be Proved.— Several courts have held that where the entire contents of the lost or destroyed will cannot be proved, probate may be granted to the extent to which the contents are proved: Skeggs v. Horton, 82 Ala. 352, 2 South. 110; Steele v. Price, 5 B. Mon. 58; Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130; Sugden v. Lord St. Leonards, [1876] L. R. 1 P. D. 154.

But we think that the rule announced by the court in Butler v. Butler, 5 Harr. 178, is the safer rule. The court said: "In order to establish a last will and testament, which has been lost or destroyed, the same formalities and rules of law must be observed as are applicable to other lost or destroyed instruments; for I know of no reason founded either in the policy of the law or any facts arising from any peculiar circumstances attending such cases, to make them exceptions to the general rules which are so well settled and established as to all other cases.

"First, then, the existence of the instrument in a legal form must be proved; secondly, its loss or destruction; and thirdly, its contents. Nothing short of this will satisfy the requirements of the law which governs all cases of this sort; therefore, proving part only of the contents of a will which is lost or destroyed is not sufficient to establish it, even as to the part so proved, unless it satisfactorily appears that there is nothing in the preceding or subsequent part of the will which would qualify, change, or in any way alter the particular devise proved; for without knowing the certainty of the will and the language used by the testator, it would be impossible to determine what estate would pass under it. The words of the particular devise, which may be attempted to be established, might convey a fee simple; yet something might precede or follow, which would reduce it to a life estate, or subject it to some other restriction or limitation; or the words of the devise might create but a life estate, which by the preceding and subsequent part of the will might be enlarged and extended to a fee simple; and either an estate in fee simple, for life or for years, might depend entirely upon some contingencies, limitations, or restrictions imposed by some subsequent part of the will."

The observations of the court in Davis v. Sigourney, 8 Met. 487, were also to the same effect. In Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873, it was observed that any clause of a lost will which is complete in itself and independent of other provisions of the will may be admitted to probate, although other provisions cannot be proved, but it must be apparent that the unproved provisions cannot affect the provisions which are proved.

The probate of a lost or destroyed will is authorized where the evidence clearly establishes such part, though it does not disclose all

the other parts, if the will has been fraudulently destroyed after the death of the decedent by her husband or other persons against whose interest the probate of the will is sought: Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812.

In the principal case (Williams v. Miles, 68 Neb. 463, ante, p. 431, 94 N. W. 705, 96 N. W. 157), the court decided that the contents of a lost will must be shown to such an extent as is necessary to establish a revocation of any former will by implication where no express revocation is shown, and that such revocation must be shown by clear, unequivocal and convincing evidence.

Code provisions relating to the proof of the provisions of a lost will apply only to those provisions which affect the disposition of property, and are of the substance of the will; hence the failure of the witnesses to agree as to whether a certain person or any person was appointed executor is not such a portion as affects the disposition of the property: Early v. Early, 5 Redf. Sur. 376.

c. Sufficiency of Proof if Only the Substance of the Will be Shown. It is sufficient if the substance of a lost or destroyed will be proved without proving the precise language employed in the will: Allison's Devisees v. Allison's Heirs, 7 Dana, 90; Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812. In Estate of Camp, 134 Cal. 233, 66 Pac. 227, the court said: "If their testimony respecting the contents of the lost portion of the will coincides as to the provisions therein made by the testator, the court is authorized to establish such provisions as a portion of the will, even though the witnesses may differ as to their remembrance of the exact language used by the testator. Thornton, in his treatise on Lost Wills, says (section 108): 'It is enough to prove the substance of the will without proving the precise statement of the language or terms used in it.'

"In Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812, that court said, with reference to the sufficiency of the petition: 'To require that a copy of the will, or the language of the bequests in detail, should be pleaded, where no copy has been preserved, and where the memory of witnesses does not hold the exact words, would not only deny the substance for mere form, but would offer a premium upon the rascality of one whose interests might suggest the destruction of the will'; and in answer to the contention that the findings must establish the exact words of the will, said: 'We have said upon the demurrer to the complaint, that the substance is sufficient where the exact words cannot be established, and more certainty in findings cannot be required than is required in pleading or in evidence.' See, also, McNally v. Brown, 51 Redf. 273. In jurisdictions, where the contents of a lost will may be proved by a single witness, it is held that such witness is not required to repeat the exact language of the instrument. Allison's Devisees v. Allison's exact language of the instrument: Allison's Devisees v. Allison's son v. Irwin, 101 Ill. 411; Burls v. Burls, L. R. 1 P. D. 472. A notable case in which this rule was applied was that of the will of Sir

Edward Sugden: Sugden v. Lord St. Leonards, L. R. 1 P. D. 154. Under the reason of this rule, a different remembrance of the exact language of the will by different witnesses would not take away the right to have the provisions of the will established, which are supported by the language told by each of them, and are consistent therewith.

"The testimony of each of the witnesses herein was to the effect that the disposition of his property made by the testator in the missing portion of his will was in favor of his wife during her lifetime, and for their children after her death. The testimony of the witness Bonham was more concise than that of McQuiddy, and the finding of the court corresponds more closely to this; but, although McQuiddy does not give the same language as does Bonham, and himself states the same in different forms, there is no contradiction between them as to the substance of the testator's provision for this disposition of his property. The property disposed of, the persons in whose favor the disposition was made, and the extent of the disposition in favor of these persons, were the same."

Under a code provision that the will shall be "clearly and distinctly proved by at least two credible witnesses," the witnesses need not be able to testify to the exact language of the lost will, but they must be able to testify to the substance of the whole will, so that it may be incorporated in the decree should the will be admitted to probate: McNally v. Brown, 5 Redf. Sur. 372.

d. Effect of Discrepancy in Evidence as to the Contents of the Lost Will.—Two witnesses need not concur in their evidence as to the entire contents of an alleged lost or destroyed will, so that the instrument can be reproduced in writing and written out at full length upon the probate records. It is sufficient that they agree as to the substance of the provisions conferring some property rights upon the devisees or legatees: Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812.

But where there are four or five witnesses, no two of whom agree as to the entire contents of the will, and all, or nearly all, of whom affirm their recollection to be indistinct and imperfect, there is not that degree of proof which convinces the mind and satisfies the judgment as to what the contents of the lost will were: Rhodes v. Vinson, 9 Gill, 169, 52 Am. Dec. 685. And where four witnesses testify to having read the lost will three years before and three of them testify that the devise was to the heirs of the testator's mother, while the other witness testifies that it was to the mother "and" her heirs, and the testator, who was a lawyer, was his mother's only heir, and the mother was dead when the will was executed, it was held that the provisions of the will were not clearly and distinctly proved by two credible witnesses: In re Purdy's Will, 25 Misc. Rep. 458, 55 N. Y. Supp. 644.

e. Effect of Evidence of the Scrivener as to the Contents Given in the Form of an Alternative.—Where the lawyer who drew the will

testifies that the lost will either gave the whole estate to the wife absolutely or that it gave it to her for life with remainder to her children, but he could not testify which, but thought that it gave the whole estate to the wife absolutely, the testimony lacks the statutory elements of clearness and distinctiveness: Matter of Ruser, 6 Dem. Sur. 31.

f. **Effect of Evidence of an Impression of the Contents Without Any Positive Recollection.**—Where a witness who had drawn three or more wills for the testator simply had an impression, but no positive recollection of drawing a will subsequent to the one offered for probate, and could not fix its date, or state whether it was attested, or the names of the witnesses to it, or tell which will he followed out of several wills shown him, the evidence is insufficient to show that a lost will was executed revoking former wills: West v. West, 144 Mo. 119, 46 S. W. 139.

So, also, in Davis v. Sigourney, 8 Met. 487, the question also arose. The facts as stated by the court were as follows: "The witness, having in his possession the will of 1834, a rough draft of the will of 1837, and the will drawn by him in 1840, undertakes, from these materials, and from his recollection, to testify as to the contents of the will of 1837, and the codicil or codicils thereto, according to a copy of the substance thereof prepared by him. By this copy, it appears that there was bequeathed to the testator's two unmarried daughters the sum of fifteen hundred dollars each. The witness testifies that he thinks that was the sum; and when interrogated how clear was his recollection, he answers, 'If I have any doubt, it is a very slight one, and I do not wish to be any more confident than I have already expressed.' He also testifies that there may have been some slight alterations between the will of 1837 and the rough draft; but he does not remember any. He says it was mainly so; and when asked whether it differed in any point, he answers, 'I do not remember at this moment that it did, but I cannot be positive.' He testifies that the rough draft was an outline prepared to be shown to the testator, and if he should have made any suggestion of an alteration, it would, of course, have been made. The witness is equally uncertain to what extent he followed the will of 1837, and the codicil or codicils, in making the will of 1840.

"In the will of 1834 the devises to the daughters of their shares in the real estate were in fee simple; whereas, in the will proved in the probate court, the shares of the daughters are given to them for life, with remainder to their descendants. And as to this alteration, Mr. Simmons testifies that he does not distinctly remember that it was made by the direction of the testator, though he had no doubt that it was.

"Upon such doubtful evidence, the court cannot feel justified in confirming the decree of the judge of probate establishing this will. To authorize the probate of a lost will, by parol proof of its contents, depending on the recollection of witnesses, the evidence must be

strong, positive and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act upon probabilities.''

g. Proof of Contents Where the Will was Fraudulently Destroyed. Where one destroys a will or connives at its destruction, in a contest between the spoliator and an innocent party, the latter is only required to show in general terms the disposition which the testator made of his property, and is not required to produce as high a degree of proof as in a case where the circumstance of spoliation does not occur: Anderson v. Irwin, 101 Ill. 411; In re Lambie's Estate, 97 Mich. 49, 56 N. W. 223.

h. Effect of Evidence of Witness Who Only Heard the Will Read or Who Had Read Only a Part of It.—Testimony of a clerk in a lawyer's office, who heard the scrivener read the will in the presence of the testator at the time of its execution is hearsay relating to the scrivener's declarations: Colligan v. McKernan, 2 Dem. Sur. 421. And testimony as to the contents of a lost will by a witness who has not inspected it but merely heard the testator read it, has been rejected as being in effect only testimony as to the declarations of the testator: Clark v. Turner, 50 Neb. 290, 33 L. R. A. 433, 69 N. W. 843. Testimony by a witness who did not read the whole will or otherwise know its contents is of no appreciable value: Matter of Ruser, 6 Dem. Sur. 31.

In Morris v. Swaney, 7 Heisk. 591, the court, in discussing the value of evidence by a person who only heard the will read, said: ''There is no doubt that the knowledge of a witness who only hears a paper read is not of as high a character as that of a witness who reads himself, for the witness who hears it read cannot know that it is correctly read to him. Still his evidence must be admissible. How satisfactory it will be depends upon other circumstances.

''It cannot be upon principle that the evidence of the contents of a paper must necessarily be derived from a reading by the witness. Records may be proved by an examined copy; that is, by producing a witness who has compared the copy with the original, or with what the officers of the court, or any other person, reads as the contents of the record. It is not necessary for the persons examining to exchange papers, and read alternately both ways: 1 Greenleaf on Evidence, sec. 508. This shows that the reading by another party may be the means by which the witness obtains a knowledge of the contents of the paper.''

i. Use of a Copy or Draft in Proving the Contents of a Lost or Destroyed Will.

1. **In General.**—Probate of a lost or destroyed will may be had upon proof of its contents by a copy of the original will, since the copy constitutes, under such circumstances, the best evidence in the power of the party seeking the probate of the lost will: In re Happy's Will, 4 Bibb, 553; Graham v. O'Fallon, 3 Mo. 507; Spencer v. Spencer, 1 Gall, 622, Fed. Cas. No. 13,233.

Under the New York statutes a correct copy or draft of a lost or destroyed will is equivalent to one witness: In re Granacher's Will, 74 App. Div. 567, 77 N. Y. Supp. 748, affirmed in 174 N. Y. 504, 66 N. E. 1109. Hence where the scrivener produces the draft of the will which was engrossed by his clerk, and after being so engrossed was executed by the testator, the draft may be treated as a substitute for one of the witnesses required by the statute: Collyer v. Collyer, 4 Dem. Sur. 53.

But where the proponent fails to establish the correctness of a copy proposed for probate, the failure may be considered in determining the credibility of the parol evidence to establish the will: Jaques v. Horton, 76 Ala. 238.

2. **Effect of Use of Incomplete Copy or Draft Showing that Certain Clauses were Altered in Drawing the Will.**—The fact that the lost will contained a clause not in the copy offered in evidence, to the effect that the husband of the testatrix should be executor, will not prevent the probate of the copy where it is shown that the husband died prior to the testatrix: Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873. Where a draft of a will, after showing unmistakable disposition of the realty, had a clause directing the personal property to remain in the family for six years, and then to be divided equally among the four younger sons, there being eight children in the family, but at the side of the clause, inclosed in brackets, are the words: "this altered," and at the foot of the writing are added the words, "must remember to divide the personal property," it was held that the true meaning of the clause was that the personal property should be divided among all of the children instead of amongst the four younger children: Bailey v. Stiles, 2 N. J. Eq. 220.

3. **Effect of Pencil Draft Compared by Scrivener with the Lost Will.**—Where the will was accidentally destroyed by fire while in the possession of testator's attorney, a pencil copy drafted by the attorney from oral instructions given by the testator, and compared by the attorney with the original will before it was executed, the execution of the will being before the attorney and another, is sufficient to authorize the probate of the pencil copy where it is identified by the attorney who drew it: Coddington v. Jenner, 57 N. J. Eq. 528, 41 Atl. 874.

4. **Effect of Copy of a Holographic Will.**—Where the will offered for probate was a copy of a holographic will, testimony of the person who read the copy and the person who copied it, together with the copy itself, fulfills the requirement of the code that a lost or destroyed will be "clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness": In re De Groot, 9 N. Y. Supp. 471.

5. **Effect of Record of the Lost Will Recorded at Request of Testator During His Lifetime.**—In proceedings to probate a will destroyed by the testator during temporary insanity, although the record of the will caused to be recorded in the recorder's office by the tes-

tator was not competent evidence as a record, still it is competent for the purpose of exhibiting a copy of the instrument, and where the copy is shown to be a true one by the testimony of one witness, it is not necessary to prove the exact contents by any other witness, provided that some other witness states in general terms the provisions of the lost will, in order to comply with the provisions of the statute requiring proof by "a correct copy and the testimony of one witness": Forbing v. Weber, 99 Ind. 588.

XX. Proof of Lost or Destroyed Will, After Its Probate, for Use in Proceedings Other than Its Probate.

a. Presumption Arising from Loss After Probate.—Where it is shown that a will was admitted to probate before its destruction or loss, the presumption arises that it was properly executed by the testator: Kotz v. Belz, 178 Ill. 434, 53 N. E. 367; Marshall v. Marshall, 42 S. C. 436, 20 S. E. 298; McNeely v. Pearson (Tenn. Ch.), 42 S. W. 165.

b. Effect of Probate Records and Certified Copies Thereof.—After a will has been probated and recorded in a proceeding had for that purpose in the proper court, such record is prima facie evidence in future proceedings contesting the validity of the will: Banning v. Banning, 12 Ohio St. 437; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209. Consequently, where the original will has been lost, the record of the probate in the book of the judge of the probate court is admissible in evidence: Jackson v. Lucett, 2 Caines, 363. And a copy of a will with letters testamentary, under the hand and seal of a deputy commissary, is admissible in evidence upon proof that diligent search has been made for the original: Smith v. Steele, 1 Har. & McH. 419. And where a witness testified to the contents of a lost will, and the records of a county court show how the lands in controversy were devised by the will, and the heirs and devisees had for forty years acquiesced in the use of the land under the devise as shown by the records, the court will hold that the contents were shown by clear and convincing testimony: McNeely v. Pearson (Tenn. Ch.), 42 S. W. 165. But where the record of the probate court merely shows that the will was probated, but does not show its contents, and the will was not recorded, and the testimony of witnesses claiming knowledge of its contents vary as to the contents, no two witnesses agreeing to the substance of the important dispositions, the evidence is insufficient to establish the contents of the will: Nunn v. Lynch, 73 Ark. 20, 83 S. W. 316.

c. Effect of Code Provisions Requiring Two Witnesses to Prove a Lost or Destroyed Will.—Under the statutes of New York, requiring the contents of a lost or destroyed will to be proved by two credible witnesses, the court has held that the provision only applies to proceedings for the purpose of probating the will, and not to other proceedings in which it is necessary to prove the contents of a lost or destroyed will: Harris v. Harris, 26 N. Y. 433.

d. How Lost or Destroyed Will may be Proved Where the Probate Records have been Destroyed by Great Conflagrations or the Like.—The manner in which a will lost or destroyed by a great conflagration may be proved where the will had been probated and made a matter of record is shown by the case of Kotz v. Belz, 178 Ill. 434, 53 N. E. 367. Inasmuch as the opinion of the court discusses both the facts and law, we will quote the portion of the opinion relative to the subject in detail. The court, in discussing the subject, said: "Did John E. Weber die testate? The complainant in the original bill, Louis P. Kotz, alleges that John E. Weber died intestate, while all the other appellants except Louis P. Kotz charge in their answers to the cross-bill that John E. Weber died leaving a last will and testament. To sustain the cross-bill, defendants called Henry H. Handy as a witness. He testified he had been an abstracter in the city of Chicago for thirty-seven years, and the custodian of all the abstract books saved from destruction in the great Chicago fire in 1871. He stated there were minutes upon the books of original entry that the estate of John E. Weber was indexed in the estate book of Chase Bros. as pending in the county court of Cook county at the time of the fire; that in other books of original entry of Chase Bros. it appeared that the will of John E. Weber, as document No. 76,413 was recorded in the recorder's office; that by the books of Jones & Sellers, another abstract firm, the will of John E. Weber, dated January 27, 1864, was recorded February 24, 1864, in volume 264, page 32, in the recorder's office of Cook county, as document No. 76,413, thus supplementing and confirming the memoranda taken from the books of Chase Bros. The evidence further shows that John E. Weber died February 18, 1864; that the will was made January 27, 1864 (about three weeks before his death), and was recorded February 24th—which, taken in connection with the estate book of Chase Bros., can lead to no other reasonable conclusion than that the estate of Weber was pending in the county court of Cook county, and that it must have been probated in the county court and a certified copy recorded in the recorder's office of Cook county. Sections 23 and 24 of chapter 116 (3 Starr & Curtis' Annotated Statutes, second edition, page 3360), entitled 'Lost or Destroyed Records,' provide, in brief, that upon the trial of any suit or proceeding pending in any court of this state, when it shall appear orally in court or by affidavit that the original of any deed or other instrument in writing is lost or destroyed, etc., the court shall receive as evidence any copy, extracts, or minutes from such destroyed records, or from the original thereof. The witness explained the abbreviations and dates, their meaning, etc. This kind of testimony was properly admitted. This court said in Converse v. Wead, 142 Ill. 132, 31 N. E. 314: 'A witness who was familiar with the system of entries and making of abstracts by the abstract makers, and knew their rules and had worked with their men before the fire, and had assisted them daily in taking off minutes of the deeds from the records, swore as to these abbrevia-

tions,' etc. In Smith v. Stevens, 82 Ill. 554, this court said, with reference to the burned records act: 'The condition of property owners in Chicago after the great fire of October, 1871, was appalling, demanding legislative interference. A great evil had befallen them, which this act was designed to remedy. It is emphatically a remedial act, and, in accordance with a well-established canon, it must receive a liberal construction, and be made to apply to all cases which, by a fair construction of its terms, it can be made to reach.' Certainly a will relating to the title of real estate must be held to come within the scope of this remedial statute. Another witness—Fernando Jones—who had been engaged in the business of making abstracts of title to real estate in Cook county forty years, and prior to October, 1871, under the name of Fernando Jones & Co., and afterward, under the name of Jones & Sellers, testified he knew John E. Weber and remembered his sickness and death; that he saw him during his last illness; and that there was an estate of John E. Weber in the probate court, and that he had a will, and that the will was recorded in the recorder's office. These facts establish beyond question that John E. Weber died testate, and that his will was admitted to probate in Cook county; and that there is nothing in the record tending to prove the allegations of complainants that he died intestate.''

So, also, where a will had been admitted to probate, recorded, deposited with the proper officer for safekeeping, and the public office containing the will and the records was destroyed by fire, a certified copy of the will which has been acted upon by the parties interested for years has been regarded as sufficient proof, the court observing: ''It would be a severe rule which would work great mischief to the citizens to ask higher proof than this'': Franklin v. Creyon, Harp. Eq. (S. C.) 243. And where a bill based on an alleged will is filed after a lapse of fifty years after the destruction of the records in the clerk's office through a fire, it will be dismissed where the testimony respecting the lost will is inconsistent and uncertain: Todd's Heirs v. Wickliffe, 12 B. Mon. 289.

In Smith v. Carter, 3 Rand. 167, a will which was probated was destroyed, together with all the records by a fire during the war of the Revolution, but the court allowed parol proof of its contents on the ground that it was the best evidence that the nature of the case afforded.

Where the original will and the record-books in which it was recorded were destroyed by Sherman's raid during the Civil War, and a certified copy of the original will was afterward recorded, and the book in which it was recorded was accepted by the bar and citizens of the county as containing the best attainable evidence of the records that were destroyed by the raid, and the executor of the will acted under the recorded copy of the will, the court will regard the recorded copy as a true copy of the destroyed will: Howard v. Quattlebaum, 46 S. C. 95, 24 S. E. 93.

XXI. Proceedings for the Probate of Lost or Destroyed Wills.

a. What Courts have Jurisdiction.—Considerable diversity of opinion has existed as to whether a court of equity or a court of probate had exclusive jurisdiction of proceedings to establish lost or destroyed wills. The matter, however, is generally regulated by local statutes. The subject was extensively reviewed in Dower v. Seeds, 28 W. Va. 113, 57 Am. Rep. 646, and the court announced the following to be the rule in such cases: "My conclusion then is, that in the various states of the Union, chancery courts have, and ought to have, jurisdiction to set up and establish wills, which have been lost, suppressed or destroyed, except where by some peculiar provision of the statute law equity courts are deprived of jurisdiction in such cases; and that probate courts have in such cases concurrent jurisdiction with the chancery courts, unless their jurisdiction is so restricted by statutory law as to clearly indicate that the legislature did not design in any case to permit them to admit to probate a lost or destroyed will. These conclusions, it seems to us, are supported, not only by reason, but also by the great weight of authority."

The jurisdiction to prove a will is not lost merely because the will is lost or destroyed. The only difference between the probate of a will which can be produced and one which cannot is with respect to the nature and quantity of proof to be adduced: McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971. Courts of equity exercised jurisdiction of proceedings to establish lost or destroyed wills in the following cases: Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; Bailey v. Stiles, 2 N. J. Eq. 220; Buchanan v. Matlock, 8 Humph. 390, 47 Am. Dec. 622; but such jurisdiction was denied, in Clarke v. Clarke, 7 R. I. 45; Matter of Sinclair's Will, 5 Ohio St. 290.

In the late case of Ewing v. McIntyre, 133 Mich. 459, 95 N. W. 540, the court, in discussing the jurisdiction of probate courts in such proceedings, said: "The jurisdiction to admit wills to probate is now quite generally conferred upon probate courts, and in other states this extends to lost and destroyed wills, in some cases depending upon statutes expressly conferring such jurisdiction; in others, under general statutes authorizing the probate of wills and administration of estates. We are of the opinion that the weight of authority sustains the jurisdiction under such general statutes, notwithstanding the case of Buchanan v. Matlock, 8 Humph. 390, 47 Am. Dec. 622, which holds the contrary: Morningstar v. Selby, 15 Ohio, 345, 45 Am. Dec. 579; Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Gaines v. Hennen, 24 How. 553, 16 L. ed. 770; Waters v. Stickney, 12 Allen, 1, 90 Am. Dec. 192; Clark v. Wright, 3 Pick. 67; Davis v. Sigourney, 8 Met. 487; Happy's Will, 4 Bibb, 553; Graham v. O'Fallon, 3 Mo. 507; Apperson v. Cottrell, 3 Port. 51, 29 Am. Dec. 239; Thornlin on Lost Wills, secs. 5, 6, where the above cases are reviewed. Extended discussions of the subject will be found in several of these cases, especially Adams v. Adams, 22 Vt. 50, and Dower v. Seeds, 28 W. Va. 113, 139, 143, 57 Am. Rep. 646. In Michigan the statute confers

in general language upon probate courts authority to probate wills and settle estates: Comp. Laws, secs. 650, 651. In Lloyd v. Wayne, Circuit Judge, 56 Mich. 243, 56 Am. Rep. 378, 23 N. W. 28, 31, Mr. Justice Campbell says: 'There never has been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of such estates. This rule is so general that in some states devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately.' ''

As a general rule, courts of equity have disclaimed jurisdiction over the probate of wills: Monographic note to Froebrich v. Lane, 106 Am. St. Rep. 643.

b. Right of Action and Parties to the Proceeding.—If, upon the face of the will propounded, the proponent has a probable interest in its establishment, he may maintain the action: Donlon v. Kimball, 61 App. Div. 31, 70 N. Y. Supp. 252. A petition to prove the existence of a lost will may be filed without first attacking and setting aside the proceedings whereby the succession of the testator had been administered and closed and the property divided amongst the heirs at law: In re Sprowl's Will, 109 La. 352, 33 South. 365.

The legatees, devisees and the heirs at law are all proper parties to a proceeding to establish a lost or destroyed will: In re Valentine's Will, 93 Wis. 45, 67 N. W. 12.

c. Matters Relating to the Form of the Proceeding or the Petition.—Proceedings to establish a prior will alleged to have been fraudulently destroyed and to set aside a subsequent will are properly joined: Bowen v. Idley, 6 Paige Ch. 46. A petition for the probate of a lost will which alleges that the heirs of the testatrix after her death knowingly and fraudulently burned and destroyed her will sufficiently avers that it was in existence at the time of her decease: Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812. The question whether a will was in existence at the date of the testator's death or not is one of fact: Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393.

d. Manner of Examining Witnesses and Their Right to Refresh Memory.—The mere fact that a witness testifying to the execution and contents of a will instead of reciting its provisions, stated that they were the same as those contained in a copy which was shown him, is not objectionable where this method of examination of the witness was not objected to: In re Granacher's Will, 74 App. Div. 567, 77 N. Y. Supp. 748.

And where an attorney who drew the will uniformly used a form book in drawing wills of the character of the one in issue, he may use such form book in connection with memoranda given him by the testator, to refresh his memory in testifying to the contents of the lost will: Southworth v. Adams, 11 Biss. 256, Cas., No. 13,194.

But a subscribing witness testifying to the contents of the lost will is not entitled to refresh his memory during his examination as a witness from a copy of the will, which is not known or recognized by him nor verified as a true copy of the will: Jaques v. Horton, 76 Ala. 238.

e. **Right of Distant Heir to Appeal.**—Where, at the time a copy of a lost will was admitted to probate, an heir was living in a mountainous district of a distant state, where she could not get legal advice and was ignorant of her rights, it was held that it was an abuse of discretion in the circuit court not to allow an appeal from the order admitting the will to probate, within a year thereafter: Jamison v. Snyder, 79 Wis. 286, 48 N. W. 261.

STATE v. BROATCH.

[68 Neb. 687, 94 N. W. 1016.]

CONSTITUTIONAL LAW—Appointment to Office.—A statute authorizing the governor to appoint the members of the board of fire and police commissioners of the city of Omaha is constitutional. (p. 479.)

RES ADJUDICATA—Constitutionality of Statute, When not Conclusively Shown.—In an action involving the right to an office, the title to which is dependent on the constitutionality of the statute, the only matter which becomes res adjudicata is title to the office for the term involved, though in reaching a conclusion on the subject the court necessarily affirms that the statute on which the title of one set of claimants rests is unconstitutional. (p. 482.)

RES JUDICATA—Quo Warranto—Judgment in, When Conclusive on the Officers for the Term Involved.—If a proceeding in quo warranto is brought to determine the right to an office, and the judgment therein is in favor of one claimant and against another on the ground that the statute authorizing the appointment of the latter is unconstitutional, the judgment is conclusive on the right to the office for the term involved, though the court should reach the conclusion that the ground on which the former judgment was based, namely, the unconstitutionality of the statute, is not maintainable. (pp. 484, 485.)

RES ADJUDICATA.—"**The Right, Question or Fact,**" in the legal acceptation of the terms, which, when put in issue and determined, thereby becomes subject to the rule of res adjudicata, is necessarily distinguishable from holdings and expressions of the court with reference to the principles of the law, which, when applied to the facts or thing in litigation, must control in the final disposition of the action and determine the judgment rendered therein. (p. 487.)

RES JUDICATA.—The State is Bound as Any Other Litigant by a decision whether favorable or adverse to it. (p. 489.)

RES JUDICATA—Quo Warranto, Judgment in, Effect Upon Appointees for a Subsequent Term.—A judgment in quo warranto that the appointees of the governor are not, and that the appointees of the mayor are, entitled to an office, based on the opinion of the court that the statute authorizing the former to appoint is unconstitutional, does not affect claimants of the office for a subsequent term appointed respectively by such governor and mayor, nor bind the court to adhere to its former ruling that such statute is unconstitutional. (pp. 490, 492.)

W. J. Connell and James H. Adams, for the relators.

Carl C. Wright, Frank T. Ransom and William F. Gurley, contra.

688 HOLCOMB, J. This action is brought in this court in the exercise of its original jurisdiction, by the filing of an information in the nature of quo warranto. The object of the proceeding is to try and determine the respective rights of the relators and the respondents to office as members of the board of 689 fire and police commissioners of the city of Omaha. The relators' claim of right and title to the office is based on appointments thereto made by the mayor and confirmed by the city council in pursuance of a city ordinance enacted for such purpose. The respondents lay claim to the office by virtue of appointments made by the governor under the provisions of sections 166 and 167, chapter 12a of the Compiled Statutes of 1901 (Annotated Statutes, 7635, 7636), said sections being a part of the charter act passed by the legislature for the government of cities of the metropolitan class to which the city of Omaha belongs. The mayor and city council have intervened in the action, but by their pleadings present no question or issue different from those presented by the pleadings of the respondents and the relators.

The power and authority to appoint members of the board of fire and police commissioners by the governor has been a subject fruitful of much litigation in this court, as is evidenced by the following cases: State v. Seavey, 22 Neb. 454, 35 N. W. 228; State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; State v. Kennedy, 60 Neb. 300, 83 N. W. 87; Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 431, 88 N. W. 243, 55 L. R. A. 740; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. All the above-cited cases have a bearing either direct or remote on the present controversy, and should be referred to for a better understanding of the

questions herein presented for consideration and discussion.

The prior litigation as well as the present is directly traceable to a difference of opinion prevailing in respect of the power of the legislature to authorize the appointment of members of the board of fire and police commissioners of the city of Omaha by the governor, as is provided he shall do by the sections of the charter act to which we have referred. It is the contention of the relators and the interveners, the mayor and the city council, as it has been by one of the parties litigant in these several prior cases, that the act authorizing appointments to be made by the governor is unconstitutional and void, as being violative of the principles of "home rule" or the 690 "right of local self-government" of the municipalities of the state. But two fundamental questions are presented for consideration in the present action; one being the alleged unconstitutionality of the act referred to, and the other, the question of whether the rights of the parties herein are not to be controlled and determined by the application of the doctrine of res judicata. It is insisted that by reason of the matters litigated and the judgments rendered in two of the cases heretofore cited, namely, State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, and State v. Kennedy, 60 Neb. 300, 83 N. W. 87, the respondents cannot now be heard to assert title and right to the office of which they are the present incumbents.

Regarding the first question presented for our consideration, namely, the alleged unconstitutionality of the act under which the governor appointed the respondents to the office now held and claimed by them, it would serve no useful purpose to again discuss the subject at length. While the act was held unconstitutional in State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, in the more recent case of Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 431, 88 N. W. 243, 55 L. R. A. 140, the Moores case was overruled and the act held to be within the constitutional powers of the legislature. It would be altogether profitless for us now to enter into a further discussion of the much-mooted legal propositions involved, nor do we understand counsel to urge it in more than a perfunctory manner. The Redell-Moores case should be accepted as the deliberate expression of the court on this branch of the litigation, and we adhere to the

conclusions announced and the principles of law as expressed therein. On this subject the views of a majority of the court as at present constituted are also manifested in the opinion formulated by the present chief justice in the case of State v. Kennedy, 60 Neb. 300, 83 N. W. 87.

Chief reliance for a judgment in favor of the relators in the case at bar is based on the proposition that the judgments rendered and the matters litigated in the two cases, State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, and State v. Kennedy, 60 Neb. 300, 83 N. W. 87, are res judicata as to all the parties to this action, and because thereof, irrespective of the question of the constitutionality [691] of the act under which the governor appointed the respondents, they are concluded thereby and cannot be heard to assert a right to the office they are now incumbents of by virtue of such appointments. It is to this latter question that counsel have devoted most of their briefs and their oral arguments at the time of submission, and to which we will confine ourselves in the further discussion of the case. It is insisted, if we understand counsel aright, that the judgment in the Moores case operates as a bar to the assertion by the respondents of a right to the office they are now holding, and that, because of the adjudication of certain facts therein, they are estopped from contending to the contrary, and that this action is by or against the same parties or their privies that were litigants in the two cases mentioned. It is said by counsel for relators that, while it may be true in the Moores case that as between the appointees of the mayor and the governor the thing in litigation was the office itself and the title thereto, yet nevertheless the right to the office was not the only point of issue presented or determined; that the question was also determined as to whether the mayor or governor had the right and power to appoint members of the board of fire and police commissioners; also that the act relating to cities of the metropolitan class, authorizing the governor to appoint, was adjudged to be unconstitutional; and further that the ordinance under which the appointment was made by the mayor was a valid ordinance; that all these questions were put in issue by the pleadings in that case, were litigated and determined, and, therefore, have become res judicata, binding alike on all parties thereto, and their privies.

The pleadings in the several cases are too voluminous to be set forth herein, and we cannot give an abstract of them without taking unnecessary time and space. We must content ourselves by stating what we conceive to be the essential features of the pleadings on which the judgment in the action was grounded. In the Moores case the action was by quo warranto begun by the attorney general
692 against the mayor and city council, and the board of fire and police commissioners appointed by the governor. The action was brought for the purpose of determining who were lawfully entitled to hold the office and exercise its functions. The mayor and city council, proceeding upon the theory that the act authorizing the appointment of members of the board by the governor was unconstitutional and void, had passed an ordinance providing for the appointment of such officers by the mayor, with the approval of the city council. The mayor having appointed certain parties to fill the office in pursuance of the provisions of the ordinance passed for that purpose, who claimed the right to the office, a conflict of authority between the two contending boards was imminent; and, to have a judicial determination as to which of the contending parties was the lawfully constituted board of fire and police commissioners, the action was instituted.

It is not entirely clear to us why the mayor and the council were made respondents in that action, or what precise legal interest they had in the subject matter of litigation; but however this may be, the appointees of the mayor intervened in the action and by proper pleadings set forth their claim and title to the office, as did also the board appointed by the governor. The facts pleaded show conclusively that the appointees of the governor based their rights on such appointments and such further necessary steps as would qualify them for the office; that the mayor's appointees claimed by virtue of the appointment made by the mayor and the necessary succeeding steps to qualify them for the office. It was also averred on behalf of the mayor and city council and their appointees that the act authorizing the appointment of members of the board by the governor was unconstitutional and void. Demurrers were interposed to these several pleadings by the adverse parties, which raised solely

questions of law to be determined by the court, on which the decision was grounded. The court held in the Moores case that the legislature had exceeded its constitutional [693] powers in conferring upon the governor authority to appoint such officers, and the judgment entered went in favor of the appointees of the mayor, the respondents, the appointees of the governor being ousted from the office. The subject matter of the litigation, the claims and demands of the parties, was with respect to the title of the respective claimants to the office as members of the board of fire and police commissioners. It is true the court, in a sense, determined that the act of the legislature authorizing the governor to appoint was void; that the ordinance passed by the mayor and city council was valid; and that the mayor could rightfully fill the office by appointment. In a legal sense, however, in our view the res, the thing actually decided, was that the mayor's appointees were entitled to hold the office and perform its functions for the term for which they were appointed and that adjudication was binding on the parties to the action and their privies. These other questions, especially the one with reference to the validity of the statute, unquestionably influenced the court in pronouncing the judgment rendered, yet, in our opinion, they were not the things adjudicated within the meaning of the rule which is invoked as conclusive of the rights of the governor's appointees in the case at bar. The validity of the ordinance and the right of the mayor to appoint thereunder were dependent upon the alleged unconstitutionality of the act giving the governor power to appoint. The holding of the court on and its determination of these subordinate questions was the natural, logical and legal sequence of its holding on the main legal proposition involved—that is, the power of the legislature to authorize the governor to fill the office by appointment. This latter was the principal and pivotal legal point on which the decision of the controversy hinged. The mayor and the city council, and the appointees of the mayor, could not present under the issues as an abstract proposition the question of whether the city ordinance was valid and the mayor had authority to appoint thereunder. These would [694] be but moot questions on which the court could only express an opinion and not adjudicate. There must be a res in dispute, a subject matter for controversy, and parties

to the litigation whose rights the court is called upon to adjudicate, which rights, when once determined, become res judicata as between the parties thereto and their privies. It may be, and probably is, true that in a proper proceeding the subject matter of the controversy could be the validity of the ordinance or the right of the mayor to appoint thereunder, which, when determined, would be binding on the parties and their privies under the doctrine of res judicata; but such action contemplates that there shall be parties to an action who are claiming and demanding the adjudication of their rights, in the determination of which the validity of the ordinance and its effect on the rights of such parties thus put in issue becomes essentially and actually the res in controversy. To illustrate: An injunction might be begun to restrain the enactment or enforcement of an ordinance and thereby determine the rights of a litigant. In such case an adjudication as to the validity of such ordinance would doubtless, as between the parties and their privies, be conclusive in future litigation with reference to the same subject matter. In the case at bar, however, the subject matter of litigation was not the validity of the ordinance, or the right of the mayor to appoint members of the board of fire and police commissioners. What the parties claimed and demanded the judgment of the court on, was the right and title to the office in controversy for the term for which they were appointed, and as a reason for such a demand they invoked of the court the application of certain principles of law, from which the deduction was made that the act authorizing the governor to appoint was unconstitutional, and the citizens of Omaha, as a municipality of the state, had the undeniable right to select their own officers. The holding of the court on these several questions thus presented was but the expression of an opinion regarding legal principles of an abstract character, to be followed [695] or departed from in future litigation by the application of the rule of stare decisis. Certainly, if its holding that the legislative act was unconstitutional would not in subsequent litigation regarding a different subject matter be controlled by the doctrine of res judicata, then the subordinate legal questions involved dependent upon this main one, could not operate in a different manner or their scope and effect be extended beyond that of the main question.

If counsel's contention is correct as to the scope and extent of the adjudication in the Moores case, then why may it not be said that the case of State v. Seavey, 22 Neb. 454, 35 N. W. 228, has become res judicata of the question therein determined, binding upon the parties not only in that action, but upon those in the case of State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, where the identical question was determined. In the Seavey case it was decided by a unanimous court that the legislature was empowered to authorize the governor to appoint members of the fire and police board of cities of the metropolitan class. The principal question for the consideration of the court in that case was the constitutionality of such a law, and this was the identical question determined in the Moores case, the judgment in which it is now urged is an estoppel against those claiming the office by virtue of appointments made by the governor. It may be that the two cases and the questions decided are not analogous in all respects, and yet the principle contended for by relators, if sound, might with equal propriety have been urged when it was sought to overrule the Seavey case, as was done in the case of State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624. The suggestion is made more for the purpose of calling attention to what seems to us as the extraordinary extent to which we are asked to carry the doctrine of res judicata in the case at bar.

If it be conceded, as contended for by counsel for relators, that in the Moores case it was determined and adjudicated that the ordinance under which the mayor acted was valid and he might rightfully appoint the members of the board of fire and police commissioners, and [696] that such determination should be controlled by the doctrine of res judicata, yet in our opinion, such disposition of these questions would not be conclusive of the rights of the parties to this suit, for the reason that the former controversy was in respect of a different subject matter, a different term of office, than the one now in controversy, and between parties other than those now litigating, and who do not stand in relation to them as privies in estate or in law. The two actions are entirely disconnected, both as to parties and subject matter. It is doubtless true that the judgment in the Moores case was and is an effectual bar against further litigation between the same parties or their privies as to the claims and demands therein adjudi-

cated, to wit, the right to the office for which the parties were contending for the term then in dispute, and that question was, by the judgment rendered, forever settled in favor of the appointees of the mayor; but the judgment could not, we think, have the effect, either as a bar or by estoppel by adjudication, to conclude the same or different parties claiming under a different title and for a different term, nor would other appointees, whether of the governor or the mayor, be deemed in privity with those preceding them, who claimed or held the office for another and different term. Our views regarding this particular phase of the controversy will possibly be made clearer by what is hereinafter said.

The diligence of counsel for relators has resulted in the citation of a multitude of decisions on the subject, yet we find none going to the extent contended for, nor any that would warrant us in holding that the parties to the present action are concluded by the judgment in the Moores case or the one following, where the doctrine of res judicata was applied and held to be controlling in the decision there rendered: State v. Kennedy, 60 Neb. 300, 83 N. W. 87.

The supreme court of the United States, in discussing the doctrine, say: "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and [697] directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of the rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them": Southern P. R. Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. Rep. 18, 42 L. ed. 355.

In an early case, which is frequently quoted by the courts with approval (Outram v. Morewood, 3 East, 346), it is said in relation to the subject by Lord Ellinborough: "It is not the recovery but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

It is true that an estoppel by adjudication may arise from a decision of the law as to the legal rights of the parties to the litigation, where the decision is predicated upon a fact or state of facts common to both suits. This principle may perhaps be best illustrated by a citation of [698] authorities. In Southern M. R. E. Co. v. St. Paul etc. R. Co., 55 Fed. 690, 5 C. C. A. 249, it is held that: "The estoppel arising from a finding in a previous suit between the same parties is not confined to matters purely of fact, or of mixed fact and law, but extends to a decision of the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

In the opinion it is said (page 695): "The authorities furthermore show that the estoppel arising from a finding in previous suit between the same parties is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision construing an agreement between the parties, and to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

The controversy in the case from which we have quoted arose between two railway companies over lands granted by Congress in aid of the construction of railways. Each company claimed the right to certain lands by virtue of these land grant acts, and certain steps taken by each of them, respectively, in compliance with the law and for the purpose of earning title to the land. In a prior suit, in which title to the same lands was in controversy, in determining the respective rights of the contesting parties, the decision went in favor of one of the litigants upon a construction of the laws

granting the lands and upon certain facts there in litigation with respect to the location of the proposed lines of railway, the filing of a survey thereof, the construction of certain portions of the roads, and the selection of lands claimed under the grant. The second suit, although on a different cause of action, required an adjudication of title to the same lands as in the first suit, and the doctrine of res judicata was invoked and held applicable in the second litigation. It is to be noted that in both actions the subject matter of the controversy was the title and ownership of certain lands, and the 699 decision of the court as to the ownership upon the facts developed in the first suit was an adjudication of the title, whether as a question of law or of fact or both, which was binding on the parties in the subsequent litigation. In the case of Baldwin v. Maryland, 179 U. S. 220, 21 Sup. Ct. Rep. 105, 45 L. ed. 160, cited by counsel for relator, it was decided that a judgment establishing the liability of the estate of a ward for taxes in a suit by the guardian to restrain their collection is res judicata as to that question in a subsequent action by the state against the sureties on the guardian's bond to collect the unpaid taxes. It was also held that the judgment establishing a liability to pay taxes for certain years is res judicata as to the liability for the taxes of a succeeding year when the facts affecting the liability are identical in the two cases. Other authorities making similar application of the doctrine of res judicata are cited, none of which we think go to the extent contended for by relator in the case at bar.

It must at once, we think, suggest itself to the legal mind that the "right, question or fact," in the legal acceptation of the terms, which, when put in issue and determined, thereby becomes subject to the rule, is necessarily distinguishable from the holdings and expressions of the court with reference to principles of law which, when applied to the facts or thing in litigation, must control in the final disposition of the action and determine the judgment rendered therein. The thing in dispute in the case of State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, was the right of the contending parties to the office as members of the board of fire and police commissioners, and it was with reference to this right that the parties demanded the judgment of the court. The mayor's appointees were decided to have a valid title thereto, because the court found and held, as a matter of law, that the act authorizing appointments by the governor was unconstitu-

tional and void, as being in excess of legislative power. This holding, however, and the fact that it controlled in the rendition of the judgment entered in that case, would not be an adjudication [700] of any "right, question or fact" in issue, such as would bring the holding within the operation of the rule of res judicata by estoppel; nor, for the same reason, could it be said, because the issues were found in favor of the mayor and the judgment rendered proceeded on the theory that the ordinance under which the appointments were made was valid, that such decision would have any greater effect than the holding of the court on the principal controverted proposition of law which was involved. In State v. Savage, 64 Neb. 702, 705, 90 N. W. 898, 91 N. W. 557, this court has said: "Abstract questions of law cannot be made the subject of litigation. There must be real parties, and a res in dispute that will become res judicata when the litigation is ended. In the determination of a case legal principles are invoked, and the conclusion of the court thereon announced. Whether such conclusion shall be followed, without further investigation in subsequent litigation, frequently depends upon principles of stare decisis. The thing determined by the litigation becomes res judicata, and cannot be afterward questioned between the parties, although the rule of law by which the decision was controlled is afterward found to have been incorrectly applied, and such application is no longer binding upon the court."

In the case of State v. Kennedy, 60 Neb. 300, 83 N. W. 87, the action was by quo warranto, and again presented to the court for its consideration the constitutionality of the act passed on in the Moores case, and there was also presented by the issue made up in that case the question of whether the judgment in the Moores case and the matters therein adjudicated were not, as to the parties then contending for the office, res judicata. Without making any authoritative announcement with reference to the first question presented, the court decided the Kennedy case in favor of the respondents, who were holding the office by appointment from the mayor, on the plea of a former adjudication presented by their answer to the information filed by the attorney general. The principal question in that action [701] discussed in the arguments of counsel and considered by the court was with reference to the right of the state, after it had invoked the jurisdiction of the court in the Moores case by an action in quo warranto,

to again be heard to question the title of the respondents to the office adjudged in their favor in the first action. Counsel for relators and those claiming by appointment of the governor contended quite earnestly that, because the state was acting in its sovereign capacity in respect of the appointments made by the governor, the right adjudicated in the Moores case against it was not binding in subsequent litigation, and that the doctrine of res judicata was not, therefore, applicable, and could not be invoked as in the case of ordinary suitors. In the opinion it was held, and to our minds correctly, that the state was bound as any other litigant by such decision, whether it be favorable or adverse to it. The question was also discussed in regard to the privity existing between public officers holding by the same title, and it was held that one deriving his authority from the same source as his predecessor is in privity with him, and that a judgment against a public officer in regard to a public right would bind his successor in office. The correctness of the statements contained in these propositions cannot, we think, be seriously questioned. It was not, however, absolutely essential to the decision rendered in that case to determine whether one holding a public office by appointment was in privity with his predecessor, deriving title from the same authority, the question of the right to the office being the only thing determined by the prior litigation. At the time of the institution of the suit and the rendition of the judgment in the Kennedy case, those made respondents, or a majority of them, were holding the office for the same term and by the same appointments, the right to which was adjudged in their favor in the prior case of State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624. The identical title and right to the office the court was asked to determine in the latter suit had been adjudicated in favor of respondents in the former. The term of office [702] of members of the board of fire and police commissioners is by statute limited to four years, the term of one member expiring each year. Notwithstanding the fact that the terms of the different members expire at different periods, during the whole course of the litigation over the subject of appointments and the right to the office, all have been treated and regarded not only as holding by the same authority, but for terms of the same duration and expiration of time. The respective claimants and contestants have joined together in a common cause of action or a common defense; and in the

oral arguments we were asked to dispose of the case at bar in this same way. It is conceded by all parties in interest that the terms of office of each member, the title to which was under consideration in both the Moores and the Kennedy cases, have now expired and that all save one had expired at the time of the commencement of the present action. Assuming, then, that the relators' claim of right to the office by virtue of appointments made by the mayor is for a different term from the one in controversy and adjudicated in the two prior actions, will those judgments operate as a bar or an estoppel against the respondents who claim by virtue of appointments made by the governor? Do the present appointees of the mayor claim under the same title as that adjudicated in the prior actions, and are they, in a legal sense, as respects such title, in privity with their predecessors in office? It cannot, we think, be said that the respondents in the present action claim under the same right and title as their predecessors. It is true they both derive their authority and right to the office from the same source, but there has been no transfer of the title held by their predecessors to them. Each claims by an independent title derived from one and the same authority for a different term of office. The adjudication as to the rights of the parties for the terms for which they were appointed, whether right or wrong, became final and operated as a complete bar against the other contending parties ever afterward from asserting title to [703] such office for the term then in controversy, but the rule of res judicata cannot, we think, without going to an unwarranted length, be extended any further. It cannot be said that because of such decision the court is irrevocably bound for all time to construe the statute unconstitutional, as held in the Moores case, nor that the appointees of the mayor under the ordinance enacted by the city council who are holding under a different tenure, merely because they are successors of the parties to the original litigation, can invoke the doctrine against the appointees of the governor, who are likewise holding for a different term from that involved in the prior litigation. To sum up, we are of the opinion that the thing adjudicated in the Moores case and which was held to as an adjudication in the Kennedy case was the right and title of the mayor's appointees to the office for and during the term for which appointed, and that when such terms have ex-

pired and other appointments are made by both the governor and the mayor, the court is at liberty to determine the respective rights of the contesting parties according to their lawful rights, not by the application of the doctrine of res judicata, but on principle and authority.

It is to be observed that both the judgments relied on as concluding the governor's appointees in the present litigation were rendered in actions or proceedings in quo warranto, the objects and purposes of which were to try the title and determine the rights of the contending parties to the office as members of the board of fire and police commissioners for a particular and specified term. The adversary parties in those actions were litigating as individuals and not as officials. The actions were not by or against officers in an official capacity for the purpose of establishing some official power, right, duty or obligation attaching to a public office, or pertaining to the duties of a public official as such. The litigation was for the purpose of determining who were entitled to hold the several offices and discharge their functions for the term involved, and in no manner affected the manner or method of discharging official [704] functions, or established any duty or responsibility resting on the incumbent of the office by reason of his official character. Both contending parties asseverated that their opponents were not officers and were not entitled to the office. As stated by a text-writer in discussing the nature of the proceedings and of the writ of quo warranto: "Nor does it [the writ] command the performance of his official functions by an officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed": High on Extraordinary Legal Remedies, 3d ed., sec. 604.

The supreme court of Wisconsin, speaking of a quo warranto proceeding, say: "It is foreign to the objects and functions of the writ of quo warranto to direct any officer what to do. It is never directed to an officer as such, but always to the person—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in, or exercise any functions of, the office to which he lays claim": Attorney General v. Barstow, 4 Wis. 567.

This distinction is material, and should be borne in mind, in order that the case at bar may not be confused with those cases which rightly hold that a judgment against a public officer in regard to a public right binds his successor in office, and that such officers are regarded as being in privity with their predecessors when they derive their authority from the same source. In State v. Kennedy, 60 Neb. 300, 83 N. W. 87, in announcing this rule of law, the court cited with approval the case of Holsworth v. O'Chander, 49 Neb. 42, 68 N. W. 334. In that case the controversy was with respect to the rights, duties and powers of a road overseer whose predecessor, in his official capacity had been, in a proper action, restrained from interfering with an alleged highway. [705] It was held that a judgment upon the merits against the overseer was a bar to a subsequent proceeding by a successor in office of the former overseer, where the rights of the parties depended upon the facts put in issue in the first suit. Other authorities, in abundance, of like tenor, might be cited, but the one mentioned is deemed sufficient. The present action, in its relation to the two former judgments which are pleaded in bar or as an estoppel, and the matters therein litigated, does not fall within the rule laid down in the O'Chander case and other like authorities. We are in the present action to determine the rights of the parties herein uncontrolled by the judgments in the Moores and Kennedy cases, because the subject matter is not the same and because the parties are not the same; nor are they, in respect of the matter therein litigated, in privity with their predecessors who held under a different appointment and for a different term.

Entertaining, as we do, the opinion that the case of Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 431, 88 N. W. 243, 55 L. R. A. 740, is a correct exposition of the law in respect of the validity of the act authorizing the governor to appoint, and that the judgments in the Moores and Kennedy cases are not conclusive as to the rights of the governor's appointees as against the relators and the interveners, the mayor and the city council, it follows that the respondents, who claim by virtue of appointments made by the governor, are lawfully entitled to the office, and should have judgment in their favor; and that the action begun by the relators and the petition of the interveners, the mayor and the city council, should be dismissed. The interveners Peabody and O'Connor,

who were appointed by the governor as members of the board prior to the judgment in the Kennedy case, and who were parties to that action, claim title to the office by virtue of such appointment. The judgment in the Kennedy case went against them, and that judgment has become final. That judgment was adverse to them as to their right to the office for the identical term they are now contending for. Furthermore, the term of office to which they assert [706] title has expired, and consequently no judgment in any event could be entered in their favor. Their petition of intervention is therefore dismissed. Judgment will be entered in this court in conformity with the views hereinbefore expressed.

Judgment for respondents.

SEDGWICK, J. If the constitutionality of the statute making it the duty of the governor to appoint a board of fire and police commissioners for the city of Omaha is conceded, the conclusion that these relators are not entitled to the writ asked for seems to follow. The majority of the court adheres to the ruling in Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 431, 88 N. W. 243, 55 L. R. A. 740, upholding the validity of the statute.

It is suggested in relators' briefs that each member of the court ought to "carefully consider the question and review the authorities bearing upon it." This duty is fully appreciated, but other and more pressing duties are allowed to supersede it for the present, not because the importance of the question in the jurisprudence of the state is disregarded, but, rather, because its immediate discussion could not be productive of any practical results, and therefore it ought not to be allowed to interfere with other duties that cannot be postponed.

A Statute Creating a Board of Police Commissioners for a town, to be appointed by the governor, and authorizing them to appoint, remove, equip, and fix the pay of police officers has been held not unconstitutional as taking from the town the control of local affairs: Gooch v. Exeter, 70 N. H. 413, 85 Am. St. Rep. 637. See in this connection, Redell v. Moores, 63 Neb. 219, 93 Am. St. Rep. 222; State v. Barker, 116 Iowa, 96, 93 Am. St. Rep. 222; Commonwealth v. Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801; Ex parte Lewis, 45 Tex. Cr. Rep. 1, 108 Am. St. Rep. 929.

A Judgment of One Court is Conclusive in another in an action between the same parties, not only as to the same cause of action, but as to other causes involving the right or title asserted and the the defenses interposed in the previous action; and not only as to

those matters expressly determined, but also as to those matters collaterally involved and necessarily determined in reaching the final judgment: Rew v. Independent School Dist., 125 Iowa, 28, 106 Am. St. Rep. 282. See, also, Estate of Harrington, 147 Cal. 124, 109 Am. St. Rep. 118; Thompson v. Hemenway, 218 Ill. 46, 109 Am. St. Rep. 239; Moore v. Snowball, 95 Tex. 16, 108 Am. St. Rep. 596. As to whether the rule of res judicata extends to matters which might have been but were not actually litigated and decided in the previous action, see Brack v. Boyd, 211 Ill. 290, 103 Am. St. Rep. 200, and cases cited in the cross-reference note thereto.

The Conclusiveness and Effect of a Judgment in Quo Warranto are discussed in Waterman v. Chicago etc. R. R. Co., 139 Ill. 658, 32 Am. St. Rep. 228; Caldwell v. Wilson, 121 N. C. 480, 61 Am. St. Rep. 672.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

CHARLTON v. COLUMBIA REAL ESTATE COMPANY.

[67 N. J. Eq. 629, 60 Atl. 192.]

FRAUDS, STATUTE OF.—Only the Party to be Charged Need Sign an Agreement within the statute of frauds. Its signing by the other party is immaterial. (p. 498.)

FRAUDS, STATUTE OF—Several Papers.—It is not necessary that all the terms of a contract be agreed to at one time, nor written on one piece of paper. If all the papers taken together contain the whole bargain, they form such a memorandum as satisfies the statute. (p. 499.)

FRAUDS, STATUTE OF—Memorandum Addressed to Third Person.—It does not signify to whom the memorandum is addressed; it may be to a third person and yet be a good writing to satisfy the statute of frauds. (p. 499.)

STATUTE OF FRAUDS—Undelivered Writing as Containing Part of Evidence of Contract.—Where the memorandum required to satisfy the statute of frauds specifies that a sum designated has been received for a lease for which details are to be settled, a lease subsequently signed by the party to be charged, but never delivered, is admissible to show that such details have been settled, if with the other and pre-existing memorandum it shows a complete agreement upon the terms of the lease. (pp. 499, 500.)

Allen B. Endicott and Enoch A. Higbee, for the appellant.

George A. Bourgeois, for the respondent.

629 FORT, J. The bill in this case is filed for the specific performance of an alleged agreement to make a lease. The written memoranda in evidence to prove the alleged agreement consisted of two writings, as follows:

"Agreement made this seventh day of May, between Columbia Real Estate Co., of the first part, and Mrs. Charlton, of Atlantic City, of the second part, witnesseth, that the party of the first part will make a lease for ten years of a certain

building on their grounds in rear of stores, to contain about eighty feet in width by one hundred feet in depth, with a fourteen feet entrance from boardwalk, the consideration to be a rental of [630] twelve hundred dollars per annum, payable yearly in advance, lease to date from June 15th, 1901. The party of the first part to be put to no expense whatever in this matter, and security to be given for the rent.

"COLUMBIA REAL ESTATE CO.,
"By H. J. BERGMAN, Agt."
"S. A. CHARLTON.
"Witnessed by
"IDA J. ATKINSON."

"Received, Atlantic City, May 7th, 1901, of Mrs. S. A. Charlton, one hundred dollars on acc. of agreement for lease to be made to Mrs. Charlton, for which details are to be settled on. "COLUMBIA REAL ESTATE CO.,
"By H. J. BERGMAN, Agt."

The vice-chancellor found that these two papers were signed and passed at the same time and relate to the same transaction, and must be deemed parts of one instrument. With this conclusion we agree.

These papers, standing alone, would not justify a decree for specific performance. By their terms it is stated that other details are to be settled between the parties. Unless it was shown, therefore, by other writing signed by the defendant that such details had been agreed upon, the bill must be dismissed.

There was proof in the cause of negotiations between the parties looking to an agreement as to the details of the proposed lease under the terms of the writings of May 7, 1901, and a draft of a lease was offered in evidence, signed by the complainant, which it was alleged embraced all the details under the said writings of May 7, 1901, as finally agreed upon in the negotiations between the parties. It was not disputed that a draft of lease containing all the details was prepared for the purpose of carrying out the agreement contained in the writings of May 7, 1901. It was admitted that it was so prepared for the defendant by his attorney. A duplicate of this detailed lease was sent by the defendant to the complainant for her acceptance and signature.

That these details were accepted by the complainant is evidenced by her signature to the paper sent to her, as it appears in evidence. To establish that these details had also been agreed upon and accepted by the defendant, in compliance with the writings of May 7, 1901, the complainant offered to prove [631] that the defendant had signed a duplicate of the paper in evidence signed by the complainant.

To make this proof the complainant called for the production of said duplicate, as signed by the defendant, and upon this point the record is as follows:

"Henry J. Bergman sworn for complainant.

"Direct Examination by Mr. Higbee.

"Q. You are one of the officers of the Columbia Real Estate Company? A. Yes, sir.

"Q. You are the Mr. Bergman who had negotiations with Mrs. Charlton, the complainant, are you not? A. I am.

"Q. Look at Exhibit C-1—did you ever see that before? A. I think I have.

"Q. When and where? A. About the latter part of May, or the early part of June, at Mr. Bourgeois' office.

"Q. You know whether or not there was a duplicate prepared of that? A. Yes, sir.

"Q. Who has the duplicate? A. I have it.

"Q. Where is it now? A. Mr. Bourgeois has it.

"Mr. Higbee.—We ask for the production of the duplicate.

"Mr. Bourgeois.—Here it is [producing it].

"Q. [Paper produced by Mr. Bourgeois being handed to counsel for complainant, he shows it to the witness and asks:] 'Who is Orro G. Leonard, who has signed his name as president?'

"[Objected to as irrelevant.]

"The Vice-Chancellor.—What significance has this?

"Mr. Higbee.—We want to show that this lease, in duplicate, was executed by the Columbia Real Estate Company.

"The Vice-Chancellor.—What difference does that make?

"Mr. Higbee.—If the lease which was produced to us, having been prepared by their attorney, and which we signed, and also the duplicate, which they acknowledge to be a duplicate, is signed by the defendant himself, it certainly goes to show, it seems to me, that those were the terms agreed upon by the parties.

"The Vice-Chancellor.—An undelivered though signed contract, remaining in the possession of the parties bound by it, has no legal efficacy. It is only when the party obligated has passed it over to the other party that it becomes of any binding effect. The paper marked Exhibit C-1 is in no way obligatory upon Mrs. Charlton, because it remained in her possession. The paper here produced on call by the attorney for the defendant is no obligation whatever upon the Columbia Real Estate Company, because it remained in the hands of the attorney for the Columbia Real Estate Company. The mere execution gave it no force or effect; it is its delivery that gives it force."

632 In excluding this offer of proof, we think the learned vice-chancellor erred. The writing was admissible in evidence. This offer was not made to prove a lease, but to prove by this writing taken in connection with the writings of May 7, 1901, that all the terms or details of the proposed lease had been fully agreed upon by writings signed by the party to be charged therewith.

It is clear, as the vice-chancellor held, that the duplicate signed by the defendant's president could not become a lease until it was delivered, but it was none the less a memorandum in writing, signed by the defendant, showing the details of the proposed lease, as they had been agreed upon between the parties pursuant to the memoranda of May 7, 1901.

Our statute reads as follows: "That no action shall be brought (4) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized": 2 Gen. Stats. 1603, sec. 5.

The signing by the complainant is immaterial; only the party to be charged therewith need sign: Reuss v. Picksley, L. R. 1 Ex. 342, 35 L. J. 218; 1 Benjamin on Sales, p. 279, sec. 255; Laythoarp v. Bryant, 2 Bing. N. C. 744; Fry on Specific Performance, sec. 346; Seton v. Slade, 7 Ves. 265; Hatton v. Gray, 2 Ch. Cas. 164; Green v. Richards, 23 N. J. Eq. 32; Reynolds v. O'Neil, 26 N. J. Eq. 223; Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Brooks v. Wentz,

61 N. J. Eq. 474; Howland v. Bradley, 38 N. J. Eq. 288; Stoutenburgh v. Tompkins, 9 N. J. Eq. 332.

Nor is it necessary that all the terms of the contract be agreed to at one time, nor written down at one time, nor on one piece of paper. If all the papers, taken together, contain the whole bargain, they form such a memorandum as will satisfy the statute: 1 Benjamin on Sales, p. 236, sec. 220; Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; Ide v. Leiser, 10 Mont. 5, [633] 24 Am. St. Rep. 17, 24 Pac. 695; Raubitschek v. Blank, 80 N. Y. 478; 29 Am. & Eng. Ency. of Law, 852 (note 2 for cases).

Nor does it signify to whom the memorandum is addressed; it may be to a third person, and yet be a good writing to satisfy the statute of frauds. Form is not important: Browne on Statute of Frauds, sec. 354a; Bateman v. Phillips, 15 East, 272; Lee v. Cherry, 85 Tenn. 707, 4 Am. St. Rep. 800; Moss v. Atkinson, 44 Cal. 3; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Moore v. Mountcastle, 61 Mo. 424; Barnett v. McCree, 76 Hun, 610, 27 N. Y. Supp. 820; Singleton v. Hill, 91 Wis. 51, 51 Am. St. Rep. 868, 64 N. W. 588.

The reason for this is clear. The memorandum is only necessary to evidence the contract, not to constitute it. As Chief Justice Tindal says, in Laythoarp v. Bryant, 2 Bing. N. C. 744, "the contract is made before any signature thereof by the parties."

The memorandum or note is only to evidence what the contract was. To prevent perjury as to such contracts, the statute declares that evidence of what the contract was must be contained in some memorandum or note in writing, signed by the party to be charged therewith. When the memorandum exists, and is legally given in testimony, it becomes evidence of the contract claimed to have been made. The memorandum is not the contract, but only evidence of the contract.

We think that the complainant had the right to put in evidence the signed duplicate of the detailed proposal for a written lease which she contended had been prepared by the defendant and signed by it. It was evidence of an agreement upon the details mentioned in the writings of May 7, 1901, and if such writings, when taken together, show a completed agreement for a lease, they satisfy the requirements of the statute of frauds.

This is not a question of the admission of a signed deed in evidence to prove an oral agreement to convey, where no previous written memorandum of any part of the oral agreement exists. Nor is it a question whether the delivery of an undelivered deed, duly signed and acknowledged, said to have been drawn to carry out an oral agreement to convey, will be decreed by the court. The question here is simply this: Will the court, in a suit for specific performance of an oral agreement to make a lease, admit in evidence all the paper writings signed by the parties to the negotiation, even though some of the papers be signed [634] but undelivered instruments, in order to see, when all the papers are taken together, whether they contain the completed terms for a lease as agreed, so that a decree may be made?

We think this question must be answered in the affirmative.

Judge Harlan, speaking for the supreme court of the United States, in a case where a memorandum of the agreement of sale was made in which details were left to be fixed, and a deed was executed and sent for examination, as the duplicate lease was in this case, says: "Whatever may be said as to the effect of this deed in passing title, if it was delivered only for the purpose of examination, or if the previous memorandum of sale had been for any reason defective under the statute of frauds, its recitals, coming as they do from the vendor, are competent for the purpose of showing the precise locality of the property which the memorandum of sale was intended to embrace": Ryan v. United States, 136 U. S. 68, 84, 10 Sup. Ct. Rep. 913, 34 L. ed. 447.

Whether, where no signed memorandum of the oral agreement has been made, a signed but undelivered instrument, said to have been drawn to carry out the oral agreement, will alone be resorted to to satisfy the statute, it is not necessary to decide in this case. The courts differ upon that proposition.

In 29 American and English Encyclopedia of Law, second edition, 855, title, "Verbal Agreements," notes 12 and 13, will be found a citation of all the authorities in the several states affirming or denying that an undelivered executed deed will satisfy the statute. They are so variant that I shall not attempt to reconcile them, and, indeed, it is not necessary to do so upon the only question necessary to be decided in this case.

If Brown v. Brown, 33 N. J. Eq. 650, decided by this court, can be taken as an authority for an undelivered executed instrument not being a sufficient memorandum to satisfy the statute, which is not decided, still that case is not in conflict with the view here expressed, as there was not there any written memorandum of the agreement to give the assignment there sought to be specifically enforced, unless it was permissible to gather it from the signed but undelivered assignment in evidence alone: Brown v. Brown, 33 N. J. Eq. 650.

There was error in the refusal to admit the offer of the [635] signed duplicate of the undelivered lease in evidence, and for this there must be a reversal.

Upon all the other questions raised in the case we think the complainant had complied with the terms of the agreement on her part, and that for none of these should specific performance of the agreement have been denied her.

I shall vote to reverse the decree and to remit the record to the court of chancery for further proceedings in accordance herewith.

A Writing to Satisfy the Statute of Frauds must be signed by the party to be charged but it need be signed only by him: See Hall v. Misenheimer, 137 N. C. 183, 107 Am. St. Rep. 474, and cases cited in the cross-reference note thereto. And several papers signed at the same time by the party to be charged may be considered and used together to complete the memorandum: Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466. Letters and receipts, though neither are of themselves sufficient, may together make such a memorandum as will satisfy the statute: Pray v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731. As to what effect and consideration may be given to an undelivered deed under the statute of frauds, see Kopp v. Reiter, 146 Ill. 437, 37 Am. St. Rep. 156, and cases cited in the cross-reference note thereto; Morrow v. Moore, 98 Me. 373, 99 Am. St. Rep. 410.

BRADY v. CARTERET REALTY COMPANY.

[67 N. J. Eq. 641, 60 Atl. 938.]

AT A JUDICIAL SALE the Rule of Caveat Emptor Applies, and the purchaser buys only such estate or interest as his debtor has. (p. 504.)

A SHERIFF'S DEED Passes the Same Title Under the Statute of New Jersey which a deed of bargain and sale executed by the judgment debtor would pass. (p. 504.)

JUDICIAL SALE—Disparagement of Title by the Judgment Creditor.—A judgment creditor has the right at a sale under his judgment to state any facts within his knowledge respecting the property about to be sold and relating to the title, possession, or right to possession thereof, but he has no right to give his opinion or state his legal conclusion that the defendant has no title and that the purchaser will take nothing by the sale. To permit a judgment creditor to do this would be to permit him to defeat the right of the judgment debtor to have the property sold for whatever an unalarmed purchaser might prove willing to pay. (p. 505.)

JUDICIAL SALE—Enjoining Until the Question of Title is Settled.—If a judgment creditor publicly asserts, when he is about to sell certain real property under his judgment, that the defendant has no title thereto and that the purchaser will get nothing by the sale, the defendant is entitled to have the proposed sale enjoined until the question of title is determined. (pp. 505, 506.)

Collins & Corbin, for the appellant.

Ephraim Cutter and Willard P. Voorhees, for the respondent.

642 FORT, J. This is an appeal from an order of the court of chancery awarding an injunction, pendente lite, in accordance with the prayer of the bill. The bill is filed under the statute to quiet titles: 3 Gen. Stats. 3486.

With the order awarding the injunction we agreed, but we think the reasons given therefor by the vice-chancellor are in some respects erroneous.

The case was heard on the bill and affidavits, no answer or answering affidavits being filed.

The defendant purchased of the executor of Zabriskie a judgment against the complainant, which it was seeking to enforce by execution, through a sale by the sheriff of Middlesex county, and at the same time giving out at such sale, or threatening to so do, that the judgment debtor had no interest in the land being sold.

On this point the allegation of the bill is: "That at the time and place at which said sale was advertised, Edward

S. Savage, an attorney at law of the state, who is a director of said Carteret Realty Company, and the attorney acting for said company in selling said lands under said execution, although his name does not appear as attorney of record, stated to the sheriff and those present, in opposing an adjournment, that your orator had no title to said tract of land, and was not the owner thereof, and that an adjournment should not be granted because his interest in said tract by possession was not worth anything, and that the said Edward S. Savage has stated the same thing to other persons, and has stated it in a letter written to said sheriff, and has also stated to your orator that he intends to give notice of the same thing on the day of sale of said lands under said execution."

The affidavits to the said bill support this allegation, and, among other things, say that, at an interview with the complainant, Savage, the agent an attorney of the defendant, said: "That he intended, on the day to which the sale of said tract had been adjourned, to again announce that deponent had no title whatever to said tract and did not own it, but was a mere tenant, and that the Carteret Realty Company was the true owner of said tract."

643 And by another affidavit it is further stated that "deponent heard Edward S. Savage state to the sheriff and those present in opposing the granting of an adjournment that said Brady had not title to the lands advertised for sale, and was not the owner thereof, and that the interest of said Brady in said lands was only by possession and was not worth anything, and that the Carteret Realty Company was the true owner of said lands."

And it is further sworn that at an interview with said Savage, held after the adjournment of the sale, on the first advertised day, he said that "he intended, on the day to which the sale of said tract had been adjourned, to again announce that deponent had no title whatever to said tract and did not own it, but was a mere tenant, and to state that the Carteret Realty Company was the true owner thereof." Savage was a director of the defendant company and was acting for it.

Statements such as those in the bill and affidavits are more than a mere recital of an alleged claim of the defendant; they amount to an expression of opinion as to the title of

the judgment debtor, and an affirmance that he is without any legal right whatever.

At a judicial sale the rule of caveat emptor applies, and the purchaser buys only such estate or interest as the debtor has: Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Hartshorne v. Boorum, 52 N. J. Eq. 587, 33 Atl. 50; Campbell v. Parker, 59 N. J. Eq. 342, 45 Atl. 116.

The vice-chancellor, in the opinion below, on this point, states the true legal rule, when he says: "The sheriff's deed passes the same title which a deed of bargain and sale executed by the judgment debtor would pass": 3 Gen. Stats., p. 2980, sec. 7; Laws 1799, p. 486, sec. 12 (Pat. Laws, 371); 1 Nevill, p. 280, sec. 6; Hackensack Sav. Bank v. Morse, 46 N. J. Eq. 161, 18 Atl. 367; Morse v. Hackensack Sav. Bank, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62; Voorhis v. Westervelt, 43 N. J. Eq. 646, 3 Am. St. Rep. 315, 12 Atl. 533; Den v. Winans, 14 N. J. L. 1.

It is undoubtedly within the right of a person claiming to have an interest in the land being sold at a judicial sale, whether [644] such person be the judgment creditor or otherwise, to state any facts as to the property about to be sold, when such facts relate to the title, possession or the alleged right of possession thereof. Such statements can in no sense be deemed inequitable or oppressive, or as a slander of the title: 25 Am. & Eng. Ency. of Law, 788.

But it is not essential to a preservation of the rights of a judgment creditor, or other person in interest in the lands of the judgment debtor being sold, that he shall state facts within his knowledge relative to the title or possession of such land at such judicial sale. His failure to do so will not work an estoppel of any rights or remedies which such judgment creditor or other person in interest has in such lands.

Judicial sales are involuntary sales. The officer of the law is the agent of the debtor in effecting the same. He does not estop the judgment creditor by his conveyance: Den v. Winans, 14 N. J. L. 1.

The equitable rule, so general and so salutary, which declares "that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent," as applied to the sale of lands, will be found in all the cases to have been so applied in cases of conveyances inter parties, and in

no case to have been so extended as to embrace a judicial sale—a sale in invitum.

But we think that an entirely different rule applies from the one just stated, when a judgment creditor or other party in interest in the land sold not only stands by or states facts, but expressed an opinion as to the title which injures and prejudices the sale of the interest which the debtor has or which will pass under the conveyance by the sheriff or other officer. To state facts cannot injure; to express an opinion upon the facts, or without stating the facts, may be oppressive and prejudicial. It is certainly inequitable.

In the case sub judice, Mr. Savage did not content himself, as the representative of the judgment creditor, with merely standing by or with a statement of the facts, but he said, in effect: "It is my opinion, now given for the benefit of all purchasers at this sale, that the defendant has no title. He is a [645] mere squatter. A purchaser will take nothing by the sale. The judgment debtor's interest is not worth anything. The Carteret Realty Company is the true owner."

To permit a judgment creditor to so conduct a sale under his execution is to permit him to defeat the right of the judgment debtor to sell, at a judicial sale, whatever will pass under the conveyance to the purchaser, and thereby secure thereat what an unalarmed purchaser may be willing to pay.

A judgment creditor will not be permitted to assume to sell real estate and declare, as a conclusion of law or as an expression of opinion upon facts, that nothing will pass by any conveyance which may be made by the sheriff to the purchaser at the sale. Whether anything passes by a sale and conveyance of real estate at a judicial sale is a matter in which only the debtor and purchaser are concerned, and they must be allowed to determine that question for themselves from the records or from facts otherwise stated or ascertained.

The defendant, while using the process of a court of law to collect its debt, has availed itself of that occasion to start a question of title to cheapen what it proposes to sell; it, therefore, is inequitable that the legal process be pursued until such question be set at rest, the complainant having tendered by its bill a prompt opportunity to that end. The defendant should be restrained from making the sale until

the case made by the complainant's bill, as to the question of title, is determined.

For these reasons, the decree of the court of chancery should be affirmed.

The Rule of Caveat Emptor generally applies to judicial sales, and the conveyance thereat has no greater effect and transmits no greater estate than a quitclaim deed from the judgment debtor: Butler v. Fitzgerald, 43 Neb.. 192, 47 Am. St. Rep. 741, and cases cited in the cross-reference note thereto. As to whether this is true where purchasers are misled by the representations of the officer making the sale in respect to the state of the title to the property, see Hammond v. Cailleaud, 11 Cal. 206, 52 Am. St. Rep. 167; Hammond v. Chamberlain Banking House, 58 Neb. 445, 76 Am. St. Rep. 106. It has been held that the rule does not apply to executory sales of real estate by a court of equity: People's Bank v. Bramlett, 58 S. C. 477, 79 Am. St. Rep. 855.

An Injunction will not lie, according to some authorities, to restrain the slandering of title to land: Reyes v. Midleton, 36 Fla. 99, 51 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

INTERNATIONAL SILVER COMPANY v. WILLIAM H. ROGERS CORPORATION.

[67 N. J. Eq. 646, 60 Atl. 187.]

TRADE NAMES—Use of the Name of a Person as Part of the Name of a Corporation.—A body of associates organizing a corporation to manufacture and sell a particular product are not entitled to employ as their corporate name the name of one of their members, when such name is intentionally selected to compete with an established concern of the same name, engaged in the same business, to divert the latter's trade to themselves, by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. (pp. 508, 509.)

TRADE NAMES—Similarity in, When Entitles Party to Relief.—It is not essential to entitle a complainant to relief against one who assumes a trade name in a business in which the former has already acquired a trade reputation that the two names should be identical, or that buyers should be confused if they do not exercise a nice discrimination. The ground upon which the courts enjoin the use of a name is that it is likely to deceive. A nice discrimination is not to be expected from an ordinary purchaser. (p. 510.)

TRADE NAME to Which the Complainant is not Entitled to the Exclusive Use.—The fact that another besides the complainant has acquired some right to use a trade name does not prevent the complainant from maintaining a suit to enjoin the use of such name by a corporation having, as against him, no right to its use. (p. 510.)

TRADE NAME Acquired When Unlawfully Using the Name of Another.—The fact that a person has acquired some skill and ex-

perience while conducting business for the purpose of profiting by the trade reputation of another, does not, as against the latter, entitle a corporation in which the former becomes interested to adopt and use that name in the same business, though accompanied with additions sufficient to prevent a purchaser of nice discrimination from mistaking the goods of the one for those of the other. (pp. 510, 511.)

Edward A. Day, Hiram R. Mills and John P. Bartlett, for the complainant.

Craig A. Marsh, for the defendant.

646 SWAYZE, J. From the decree awarding an injunction, both parties have appealed. From the order denying the complainant an accounting, the complainant has appealed.

647 We think the vice-chancellor was right in granting the injunction, and the defendant's appeal from the decree fails; and that he was right in refusing the accounting, and the complainant's appeal from the order fails. In these respects we have nothing to add to the accurate statement of the law by the vice-chancellor.

We think he erred in refusing to enjoin the defendant from using the word "Rogers" in any form, even as a part of the corporate defendant's name, in connection with the manufacture and sale of silver-plated tableware, carried on by or on behalf of the corporate defendant.

The question involved is not the right of an individual to use his own name. That question sometimes presents difficulties which can only be met by permitting the use of the name in such a way that it shall not amount to misrepresentation as to the goods sold thereunder. The case does not even involve the somewhat narrower question of the right of a corporation to adopt a name which, when applied to the goods sold thereunder, is calculated to deceive purchasers. The later authorities favor injunctions restraining the use of the corporate name without qualification: North Cheshire etc. Brewery Co., Ltd., v. Manchester Brewery Co., [1899] App. Cas. 83; affirming the decision of the court of appeal, [1898] 1 Ch. Cas. 539.

The present case presents the still narrower question of the right to adopt and use a corporate name calculated to deceive, with an intent to profit by the trade reputation of others.

The defendant corporation did not adopt its name in order to secure the goodwill of a business which had been built up by William H. Rogers. The facts stated in the vice-chancellor's opinion, and sustained by the evidence, demonstrate, in our judgment, that William H. Rogers had engaged in the business of selling silver-plated ware, as far as he can be said to have engaged in that business at all, in view of his other vocations, solely with the object of profiting by the similarity of his name to the name of Rogers, so well known in the trade, to the goodwill of which the plaintiff had succeeded. William H. Rogers, under the facts of this case, had not acquired a trade reputation [648] for silver-plated ware. He had had no experience in the actual manufacture; his name was not a guaranty of the excellence of his wares; his experience was little more than that of a mere packer of goods made by others; most of the goods nominally made for him he had never seen or handled; he had had no more to do with the actual sales during the more active part of the business—that during which the Benedicts handled the goods in his name—than to receive a small profit over the manufacturer's price, a profit which was manifestly paid to him by the Benedicts in order that they might use the name of Rogers, and thereby profit by the trade reputation of the complainant. The name of the defendant could not, therefore, have been selected with a view to retain for the corporation the goodwill of William H. Rogers. It was selected, in our judgment, solely with the intention of deriving a profit by means of the Rogers name, from the reputation built up by many years of business activity by the predecessors of the complainant.

Such a case is not like that of a natural person using his own name. It is more nearly like the case of a natural person who voluntarily selects a name for his business which may enable him to profit by another's trade reputation.

In our judgment, the law was accurately stated by Judge Wallace, in Rogers Co. v. Wm. Rogers Mfg. Co., 70 Fed. 1017, 17 C. C. A. 575. In his language, "a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and

divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. No person is permitted to use his own name in such a manner as to inflict an unnecessary injury upon another. The corporators chose the name unnecessarily, and having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

This rule is sustained by the later cases in the federal courts: [649] Garrett v. T. H. Garrett & Co., 78 Fed. 472, 24 C. C. A. 173; Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. 357; Wyckoff, Seamans & Benedict v. Howe Scale Co., 122 Fed. 348.

It was adopted in Connecticut in one of the early cases on this subject (Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 350), and is now established in New York: De Long v. De Long Hook and Eye Co., 89 Hun, 399, 35 N. Y. Supp. 509; Charles S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 469, 39 N. E. 490, 27 L. R. A. 42.

The last-cited case must be regarded as overruling Scott Stamp etc. Co., Ltd., v. J. W. Scott Co., Ltd., 15 N. Y. Supp. 325, and Employers' etc. Co. v. Employers' etc. Co., 10 N. Y. Supp. 845, if they are inconsistent.

It is urged that the defendant in this case attempted to distinguish his goods from those of the complainant by various devices, particularly the representation of a red seal and by calling his goods the seal brand. These facts are thought to negative an intent to profit by the reputation of the complainant's wares. In view of the fact that the goods of the complainant were sold under various brands—"Eagle," "Anchor," "Star," "Scimitar"—we think the adoption of the seal was not well calculated to avoid the confusion incident to the use of the name of Rogers. If the defendant had honestly desired to avoid that confusion, much more efficient means were available. The defendant was under no compulsion to use the name "Rogers" at all, and if that name had not been used, confusion would have been impossible.

The decree advised by the vice-chancellor permitted the corporation to use the name "Rogers" "if the same be made distinctive whenever or wherever used by the prefix 'W. Henry,' and the addition of his title of office of president and

the words 'Plainfield, N. J.'" He based this result upon the fact that the predecessors of the complainant did business under several names of which Rogers formed a part, and used various marks to distinguish their wares; upon the fact that one William A. Rogers competes in some degree with the complainant, and the [650] further fact that W. H. Rogers has acquired some degree of skill and experience in the business, or in some of its branches.

The fact that the use of various names and marks by the complainant's predecessors requires purchasers to discriminate in buying goods does not, in our judgment, lessen the right of the complainant to restrain the use of a corporate name calculated to deceive, selected with intent to create confusion. In all of the cases of this kind a nice discrimination would enable buyers to avoid the confusion, for it is seldom that names are selected which are identical. "Similarity, not identity," said Mr. Justice Bradley, "is the usual recourse where one party seeks to benefit himself by the good name of another": Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. 94.

The ground upon which the court enjoins the use of the name is that it is likely to deceive, and a nice discrimination is not to be expected from the ordinary purchaser.

The fact that William A. Rogers seems to have established a right to use the name does not enlarge the rights of the defendant. As was said by Judge Shipman, in Clark Thread Co. v. Armitage, 74 Fed. 936, 21 C. C. A. 178: "It does not follow, however, because the complainant is not exclusively entitled to use the words 'Clark's Spool Cotton,' that therefore it cannot rightfully enjoin a person who is fraudulently making use of its label. The litigation in regard to the Rogers trademark showed that three distinct corporations were entitled to use the name 'Rogers' upon their goods, but it never was supposed by a court that either injured owner had not a right to suppress the use of the trade name by a fraudulent competitor, or that it was an adequate defense that there were other owners whose use was not fraudulent."

The vice-chancellor cited Baker v. Baker, 115 Fed. 297, 53 C. C. A. 157, as sustaining the defendant's right to use William H. Rogers' name, when properly distinguished, in view of the skill and experience he may have acquired in the business. To this there are two answers: 1. That skill and

experience, such as it was, was acquired in his effort to profit by the reputation of the complainant's goods. As the vice-chancellor said: "The conclusion [651] is inevitable that up to, or nearly up to, the time of the formation of the Rogers corporation, Rogers was using the name to gain for himself a profit which belonged to another. He was consciously seeking to pass off his goods as the goods of his competitor." We cannot think that a man who acquires skill and experience under such circumstances is entitled to protection against those whom he was sought to injure. 2. The case differs from the Baker case. There the defendant changed his business methods, adopted advertisements, packages and labels which met with the approval of the successors of Walter Baker & Company, and so differentiated the dress of his products as to minimize as far as possible the risk of confusion between them and those of the complainant. A part of the corporate name was the place of business, and every person who dealt with the defendant in that case was thereby notified that its business domicile was not the domicile of the complainant. After reciting these facts, the court, in that case, added, "If the name had been selected unnecessarily or for the purpose of illegitimate competition with the complainant, we should not hesitate to enjoin its use. But it was selected without any element of bad faith or unfair use." In the present case the corporate name was selected unnecessarily, with the intent to make an unfair use of it.

The decree must therefore be reversed and the record remitted to the court of chancery in order that a decree may be made in accordance with this opinion. The complainants are entitled to costs in the court of chancery, to costs in this court on both appeals from the decree for injunction. The defendants are entitled to costs in this court of the appeal from the order denying an accounting.

On appeal of defendant from decree for injunction:

For affirmance—The Chief Justice, Dixon, Garrison, Fort, Pitney, Swayze, Bogert, Vredenburgh, Vroom, Green, Gray—11.

For reversal—None.

[652] On appeal of complainant from decree for injunction:

For affirmance—Green—1.

For reversal—The Chief Justice, Dixon, Garrison, Fort, Pitney, Swayze, Bogert, Vredenburgh, Vroom, Gray—10.

On appeal of complainant from order denying an accounting:

For affirmance—The Chief Justice, Dixon, Garrison, Fort, Pitney, Swayze, Bogert, Vredenburgh, Vroom, Green, Gray—11.

For reversal—None.

If in Organizing a Corporation a Trade Name is chosen for and adopted by it similar to one adopted by another and older corporation or partnership, the use of such name may be enjoined by the latter if misleading and calculated to injure its business, irrespective of the good faith or intent to mislead the public in adopting the name: Nesne v. Sundet, 93 Minn. 299, 106 Am. St. Rep. 439, and cases cited in the cross-reference note thereto.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

TALBOT v. SIMS.

[213 Pa. St. 1, 62 Atl. 107.]

MASTER AND SERVANT—Assumption of Risks.—A stone mason who sees stones fall on two successive days from a "dog" connected with a derrick and known to him to be defective, and who, continuing his work, is injured on the third day by a stone falling on him from such "dog," cannot recover, although in the meantime he has called the attention of the foreman to the defective "dog," and is informed by him that no change will be made. (p. 514.)

MASTER AND SERVANT—Assumption of Risks.—An employé who continues in an employment which by reason of defective machinery or appliances he knows to be dangerous assumes the risk of any accident that may result therefrom, unless he continues in the employment only in pursuance of the promise of his employer to remedy the defect, and the risk is not such as to threaten immediate danger. (p. 514.)

O. B. Dickinson and J. E. McDonough, for the appellant.

J. B. Hannum, for the appellee.

[2] BROWN, J. The appellant, a stone mason, was employed by the appellee in October, 1903, in his construction of a stone wall. The stones were carried to it by a boom derrick after being hoisted by the aid of "dogs." He had worked for the appellee at the same kind of work for several months before the accident, during which time the same kind of "dogs" were used. On October 6th, two stones slipped from them within an hour and fell at the place where he was working. He and the foreman saw them fall. When the second one fell he said to the foreman, "Paddie, them dogs ain't no good. Why don't you get a pair of the round dogs?" To which the foreman replied, "You can't get nothing. There is not but one pair of round dogs on

the job." A third stone slipped and fell the next day, October 7th. This was also seen by the appellant and the foreman. About an hour later a fourth one fell, when he again reminded the foreman, who had seen the fall, that the "dogs" [3] were "no good" and would not "hold." On October 8th, a fifth stone fell and struck him, causing the injuries of which he complains. A judgment of nonsuit was directed by the court below, but the specific ground on which it was entered was not stated by the learned trial judge. He refused to take it off because he was of opinion that the plaintiff had voluntarily continued to subject himself to danger after he had known its imminence, intimating at the same time that the contributory negligence of a fellow-servant was a bar to a recovery.

Two days in succession the appellant saw the peril which overhung him every time the stones were lifted by the derrick and suspended over him. His testimony is that, as the stones were constantly slipping from the "dogs," he was "on the lookout all the time to see if the stones would fall," and "kept close watch on them all the time, afraid a stone would slip out." At the time the fifth one fell he could not have been on the lookout; and he did not, by his own vigilance, upon which he undertook to rely, protect himself from the constantly imminent danger, to which he voluntarily continued to subject himself after he knew his employer had not guarded against it and had not promised to do so. The only actual notice of the defective "dogs" that he pretends was given to his employer was that to the foreman, from whom he learned that no change would be made. From the testimony but one conclusion could have followed, if the case had been submitted to the jury, and that is that the danger was so imminent that the appellant was bound to heed it and to know that if he continued to voluntarily subject himself to it, as he admittedly did, his employer would not be liable for the injuries he has sustained. The oft-repeated rule as to this is, that an employé who continues in an employment, which, by reason of defective machinery or appliances, he knows to be dangerous, assumes the risk of any accident that may result therefrom, with the qualification that if, in pursuance of the promise of his employer to remedy the defect, and the risk be not such as to threaten immediate danger, the employé continue in the employment and be injured without fault on his part, the employer

may be liable: Brownfield v. Hughes, 128 Pa. St. 194, 15 Am. St. Rep. 667, 18 Atl. 340.

Judgment affirmed.

In the Subsequent Case of Maines v. Harbison-Walker Co., 213 Pa. St. 145, 52 Atl. 640, an action to recover for personal injury, the plaintiff testified that the machine at which he worked was in a dangerously defective condition, and that he was told by the master mechanic of his employer that it would be changed on the following Sunday. Such change was not made, and plaintiff subsequently called the attention of such master mechanic to the condition of the machine, and each time was promised by him that a change would be made the following Sunday. Plaintiff continued to work, and on a Monday morning, two weeks after such promise to change the machinery, though knowing that no such change had been made, he was injured while working with such defective machinery, and the supreme court held, without citing any authority, that it was reversible error in the trial court to grant a compulsory nonsuit, and that whether such employé was guilty of contributory negligence in continuing in his employment under the circumstances as thus detailed was a question for the jury.

The Doctrine of Assumption of Risks in the law of master and servant is discussed in the monographic notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 886-896; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 314-321. Generally, an employé who continues to work in a place after ascertaining and realizing that it is dangerous cannot hold his employer answerable in case an accident befalls him: Buehner v. Creamery Package Mfg. Co., 124 Iowa, 445, 104 Am. St. Rep. 354; Victor Coal Co. v. Muir, 20 Colo. 320, 46 Am. St. Rep. 299.

SIGEL'S ESTATE.

[213 Pa. St. 14, 62 Atl. 175.]

WILLS—Codicils—Construction and Effect.—A will and a codicil affixed thereto must be regarded as parts of the same instrument, and the codicil will not be allowed to vary or modify the will, unless such is the plain intent of the testator. (pp. 516, 517.)

WILLS—Codicils—Construction and Effect.—A gift once made by will is not to be cut down by a subsequent codicil unless the intention of the testator to that effect appears clearly or by necessary implication. (p. 517.)

WILLS—Codicils—Construction and Effect.—If a gift of an estate is made by will, a revocation by codicil or otherwise will not be implied unless no other construction can be placed upon the language. (p. 518.)

WILLS—Codicils—Construction and Effect.—If a testator, after making several legacies, by his will gives the residue of his estate to

his heirs, and on the same day executes a codicil giving a certain sum "and no more" to three named persons, who are his heirs, the latter are not excluded by the words "no more" from sharing in the residue of the estate, as such words apply only to the amounts named in the codicil. (pp. 518, 519.)

W. E. Rice, W. D. Hinckley and J. H. Alexander, for the appellant.

T. A. Lamb and F. Gunnison, for the appellee.

[15] POTTER, J. Charles Sigel died February 21, 1904, unmarried and without issue, and leaving a large estate. On the day of his death he executed a will by which he revoked all previous wills, gave certain legacies and in his own language, "the balance of my [16] estate to the heirs of Charles Sigel"—that is, to his own heirs.

On the same day he executed a codicil, which reads as follows: "I give to my sister Matilda Sigel, of Kirchheim, Germany, Mary Schmidt of East Orange, N. J., and Mary Schudt of West Seneca, N. Y., each one thousand ($1,000) dollars and to Gus Schudt my nephew, two thousand ($2,000) dollars, and no more."

It is agreed that Mary Schmidt and Mary Schudt were one and the same person, the daughter of a deceased sister of testator. Schudt was her maiden name, and Schmidt her married name. Gus Schudt was the son of testator's sister.

All three legatees were heirs at law of the testator, and in the absence of the codicil would have been entitled to share in the distribution of his estate under the residuary clause of his will.

Upon distribution of the balance shown by the executor's first account, the court below held that the legatees named in the codicil were entitled to receive the legacies there given them, and also to share in the residuary estate under the will. Appellants claim that this construction of the will is erroneous and that by the use of the words "and no more" in the codicil, the testator expressed his intention that the amounts there given should be all that the legatees named should receive, and that the residue of his estate should be divided among his remaining heirs to the exclusion of the three named in the codicil.

In such a case as this, where a will and codicil are to be construed, the rule is well settled, that they must be regarded as parts of one and the same instrument, and that the codicil is not to be allowed to vary or modify the will,

unless such was the plain and manifest intention of the testator.

In Spang v. Hill, 2 Woodw. 45, after a consideration of the authorities, the court said: "The general result of the authorities on the subject is, that notwithstanding a codicil, the provisions of a will are to stand, unless in order to effect the purposes of the codicil, it is absolutely necessary that the provisions of the will shall give way."

Chief Justice Mercur said, in Lewis' Appeal, 108 Pa. St. 133: "It is not necessary to refer to the numerous English and American authorities which hold as a canon of construction that [17] a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention. In applying this rule it is sufficient that the subsequent words indicate the testator's intention to cut it down with reasonable certainty, and it is not necessary to institute a comparison between the two classes as to lucidity: 1 Williams on Executors, 185. It cannot be cut down by any doubtful expressions in the codicil. The language of the latter must be such as to clearly establish the modification claimed before such effect can be given to it."

And in Sheetz' Appeal, 82 Pa. St. 213, this court said (page 217): "The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's clearly announced main intention."

The fundamental distinction between the nature of a codicial and a later will should be borne in mind. The later will works essentially a revocation, while the codicil is a confirmation except as to the express alterations which it may contain And therefore while in the case of a later will a revocation may be presumed, this is not true of a codicil. It means rather an addition, than a revocation.

While no case has been found which furnishes an exact precedent for the one now before us, yet we think in principle it is to be governed by the authorities which hold that a gift once made by will is not to be cut down by a subsequent codicil, unless the intention of the testator to that effect appears clearly or by necessary implication. Where it is possible to construe the codicil so as to give effect to all the provisions of the will, it certainly should be done.

We do not think that it can be said in this case that the intention of the testator to revoke the gifts of proportionate shares in the residue, made to the heirs named in the codicil, is clear, from the use of the words "and no more"; for these may be construed to apply equally well as limiting the amount of the additional gifts to the sums named in the codicil.

In Brisben's Appeal, reported in 1 Lanc. Bar, October 9, 1869, this court, speaking through Read, J., said: "It would appear to be perfectly reasonable that where a legacy is given by will to a particular individual, and by a codicil another [18] legacy is given to the same person, that the second should be considered as additional to the first, and therefore where a paper is codicilliary, and two legacies are given to the same person, they are cumulative. The more recent decisions treat this as conclusive unless a contrary purpose is distinctly manifested by the instruments themselves."

In the present case, this general principle would unquestionably make the gifts to the individuals named in the codicil cumulative, were it not for the words "and no more." The doubt raised by them is as to whether they limit the words of the will and defeat the right to share in the residue. Or do they limit only additional gifts? We are inclined to the latter construction, under the accepted principle that where a devise is made of an estate, a revocation will not be implied unless no other construction can be placed upon the language. In this case we think the construction adopted by the court below, which saves the right to share in the residue, is reasonable and fair.

If the codicil be read into the will, it would then read, "and the balance of my estate to the heirs of Charles Sigel, and in addition to the persons named in the codicil, the amounts therein named, and no more." That is, in addition to their proportionate share of the residue as heirs, under the language of the will, they get respectively the amounts named, "and no more."

We cannot accept the view that the words "and no more" in the codicil clearly and necessarily apply to the provisions of the will, and cut down the gift there made. To apply them only in limitation of the amounts named in the codicil as additional gifts, seems to us quite as much in line with the probable intention of the testator as the other sugges-

tion. In Bender v. Dietrick, 7 Watts & S. 284, which was cited by the court below, and by counsel for both sides, the decision was placed upon the ground, that "an heir at law can only be disinherited by express devise or necessary implication; and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." Justice Rogers said (page 287), in language peculiarly applicable here: "It seems to me that the expression that they shall have fifty dollars and no more, of his real and personal estate, does not [19] raise such a strong probability, as has been shown, as that a contrary intention may not be supposed. Indeed, the difficulty arising from the imperfection of the will is, to ascertain what the testator did intend. His intention is at best but matter of conjecture, and certainly on such grounds, no person heretofore has been deprived of his inheritance."

We think the conclusions reached by the court below in this case are justified by reason and the authorities. The assignments of error are overruled, and the decree of the orphans' court is affirmed, and this appeal is dismissed at the cost of the appellant.

Where the Terms of a Will Clearly give an estate, the words of a codicil must manifest an intent equally clear to revoke it; but when the provisions of the will thus expressed are repugnant to provisions contained in the will, the codicil is to be regarded as the expression of the testator's final determination on the subject: Sturgis v. Work, 122 Ind. 134, 17 Am. St. Rep. 349; note to Graham v. Burch, 28 Am. St. Rep. 353.

Of Two Contradictory Clauses in a Will the first must give way if both refer to the same subject matter. But the first clearly expressed purpose in a will is not to be overborne by subsequent modifying directions therein which are ambiguous and equivocal, and may justify either of two opposite interpretations: Phillips' Estate, 205 Pa. St. 504, 97 Am. St. Rep. 743.

HORNEY v. NIXON.

[213 Pa. St. 20, 61 Atl. 1088.]

THEATERS—Rights of Proprietors.—The proprietor of a theater is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply for, and be willing to pay for, a ticket. (p. 523.)

THEATERS—Ticket Contract—Right of Holder.—If a proprietor of a theater sells a ticket thereto, it creates a contract between him and the holder, and for a breach thereof he is bound to respond in damages. (p. 523.)

THEATERS—Tickets — License — Revocation — Damages.—A theater ticket is a mere license to the purchaser which may be revoked at the pleasure of the theatrical manager, and upon such revocation, if the person holding the ticket attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser, and may be prevented from entering or may be removed by force, and his only remedy is by an action on the contract to recover the money paid and the damages arising from a breach of the contract, and he cannot maintain an action of tort. (p. 524.)

THEATER TICKETS are Mere Licenses, for the revocation of which, before the holder has actually been given his seat, and has taken it, the only remedy is an assumpsit for a breach of the contract implied from the sale of the ticket. (p. 525.)

U. S. Kons, W. H. G. Gould and H. E. Lallou, Jr., for the appellant.

A. S. Arnold and J. S. Levin, for the appellees.

22 BROWN, J. Lewis J. Somers, the father in law of the plaintiff, purchased from the Columbia Field Club eight tickets for a theatrical performance to be given on February 26, 1904, at a theater in the city of Philadelphia under the management of the appellees. They had issued a certain number of tickets to the club, to be sold by it, as the performance was to be for its benefit. After the tickets had been issued to it a fire commission, appointed by the mayor of the city, directed the aisles of the theater to be widened as a measure of greater safety to the public by removing the end seat on each row of the center section. The eight tickets purchased by Somers were in the fifth row of this section and were numbered from 1 to 8, No. 1 being for the one along the aisle. Two of these eight tickets—Nos. 3 and 4—were purchased by plaintiff from his father in law. The order of the fire commission led to some confusion in connection with the sales of seats, as the appellees did not know who

had purchased tickets from the club before [23] the order was complied with, but arrangements were made to issue other tickets to the holders of those for the seats along the aisles which had been removed. By some oversight all of the eight seats called for by the tickets purchased by Somers were resold, and when he and his family presented their coupons to the usher they were informed that they could not, under the circumstances, be given the seats called for. They were offered eight together elsewhere, as they insisted upon being seated as a family, but these were declined as being too far back. They were then offered seats in two of the boxes, but these were refused, on the ground that, as they had come as a family, they insisted upon sitting together, and in the seats called for by their coupons. In view of the alterations made in pursuance of the order of the fire commission it was impossible for the managers of the theater to give the family these eight seats, but, according to plaintiff's own testimony, they courteously offered to seat them elsewhere. The party, however, refused every proposition and became noisy, to the annoyance of those witnessing the performance, which had commenced. They were told that they could not continue discussing the matter inside of the theater and were directed to go outside, where, according to the testimony of the treasurer of the appellees, they were tendered back the money they had paid for their tickets. After having so declined every offer to give them other seats to witness the performance, they left the theater, and the plaintiff shortly afterward brought this action to recover the price of the tickets purchased by him, and "for the inconvenience and annoyance and mortification and indignity and humiliation suffered" by him. Under the foregoing facts the court below directed a verdict for the defendants, for the reason that there could be no recovery in trespass—the form of action adopted by the plaintiff—and the single question before us is the correctness of this ruling. It was so manifestly correct that the judgment might well be affirmed without saying more.

The case as presented by the plaintiff has not a single tortious feature. He had purchased a ticket, calling, on its face, for a seat which he insisted on having, and it was the duty of the defendants to give it to him; but their failure to perform that duty was simply a failure to perform their contract with [24] the holder of the ticket, and for such fail-

ure, the remedy, as in any other simple breach of contract, is in assumpsit for damages for the breach. The confusion resulting from the change in the rows of seats, which followed the order of the fire commission, was the excuse given for not being able to furnish the family the seats called for by the tickets, and it ought to have been accepted by any reasonable person. The plaintiff, if not willing to take any of the other seats offered to him, ought to have been content to have his money refunded.

In support of the contention that the appellant has a right of action in trespass, decisions in cases of common carriers are cited, in which trespass was held to have been the proper form of action for refusal to carry passengers, or for unlawfully ejecting them without force or violence. But the difference between the duty of a common carrier and that of a theater proprietor has been wholly overlooked. That of the former is absolute to carry whoever may wish to be carried. It is a duty growing out of no contract, but rests at all times on the common carrier in return for the franchises and privileges conferred by the state. If, in violation of this duty, it refuses to receive a passenger, or unlawfully ejects him from one of its conveyances, trespass will lie upon the disregard of the implied obligation to serve the public, or the tort may be waived and assumpsit maintained for a breach of the contract of carriage, if one has been entered into. The rule is thus stated in volume 15, Encyclopedia of Pleading and Practice, 1121: "It may be stated as an abstract proposition that where the duty of a common carrier to a passenger is not one which is implied by law by reason of the relation of the parties, but depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort; but where the duty is implied by law by reason of the relation of the parties, or where the passenger sustains an injury by reason of the breach of a duty which the railroad owes to the public in general, the remedy is in tort." "When the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant, as in the case of innkeepers and common carriers, and the breach of duty is solely counted upon, the rules applying to actions ex delicto determine [25] the rights of the parties": Frink v. Potter, 17 Ill. 406. "The liability

of a carrier of passengers is a subject which has become of great practical importance since the introduction of railroads, and the subject of the measure of damages for breach of contract of carriage of a passenger has been much discussed. The relation between carrier and passenger is more than a mere contract relation; indeed, it may exist in the absence of contract. It is clear that any person rightfully on the cars of a railway company is entitled to protection by the carrier, though he is a free passenger. Any breach of this duty owed by the carrier to the passenger would seem to be a tort: recovery may be had either in an action of tort or in an action for breach of the contract. The contract made by a common carrier of passengers (and we shall see that the same is true of contracts made by all incorporated telegraph companies) is not simply a voluntary engagement such as an ordinary contract inter partes, but an agreement made in pursuance of an obligation toward all the world imposed either by his mere status as common carrier, or under his charter, or both. In other words, it is a contract which he is under a duty to make, and under a duty to perform, so that a breach is not a mere breach of contract, but also, as we have said, a tort": 2 Sedgwick on Damages, 8th ed., sec. 859.

The proprietor of a theater is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is, therefore, under no implied obligation to serve the public. When he sells a ticket he creates contractual relations with the holder of it, and whatever duties on his part grow out of these relations he is bound to perform, or respond in damages for the breach of his contract, if it is of that only that complaint can be made. Such is just the situation here. A courteous explanation was made why the contract with the plaintiff as the holder of the ticket issued by the defendants could not be specifically performed; other seats in different parts of the house were offered to him and the rest of the family, which [26] could have been occupied by them together as one party, but were declined; seats in the proscenium boxes were refused, because the party would

be separated, and even after all this they were not evicted from the building, but simply told that their loud discussion of what they conceived to be the great wrong done them could not be carried on inside the theater, to the annoyance of those who were witnessing the performance; and, without rudeness or violence, they were directed to go into the foyer, where they continued to discuss the situation. They could have had seats at any time, but would take none except those called for by their tickets.

The allegation of the plaintiff, in his attempt to make out a case of trespass against the appellees, is that, by their conduct, he was unlawfully ejected from the theater, to his mortification, indignity and humiliation. The proof is just to the contrary, and shows nothing but a simple breach of a simple contract, resulting from a cause which was explained to him and which ought to have been regarded as unavoidable. But he and some of the rest would listen to nothing but what their tickets called for. If the contract with him was broken, he is entitled to nothing more than the actual damages for the breach, and these, according to the testimony of the treasurer of the appellees, were tendered to him.

In affirming this judgment nothing more would be said but for the citation of Drew v. Peer, 93 Pa St. 234, as authority for the right of the plaintiff to maintain trespass. There is no analogy between the two cases. Peer and his wife, two colored persons, purchased tickets for reserved seats in the theater of the defendant. On the evening of the performance they passed through the street door and were within a few feet of the ticket taker at the entrance to the orchestra circle, when the man who was taking the tickets cried out "Clear them niggers out," and they were violently ejected from the building. In an action in case a recovery was had and sustained, and it was said by Sterrett, J.: "Whether the tickets conferred merely a license or something more is immaterial. If they gave only a license to enter the theater and remain there during the performance, it is very clear that the agents of the defendant had no right to revoke it as they did, and summarily eject Peer and his wife from the building in such manner as [27] to injure her. We incline to the opinion, however, that as purchasers and holders of tickets for particular seats they had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive

possession of the designated seats during the performance on that particular evening." All that was decided was that the defendant had no right to revoke the license in the manner she did and violently and rudely eject the plaintiff and his wife from the theater. The suit was for damages resulting from their rude ejection, and what is said about the tickets being more than a mere license is to be regarded as simply obiter dictum. Even as such it is certainly not in accord with the authorities in this country and in England. "Licenses which are given by the sale of tickets to theaters and other places of amusement are revocable": Cooley on Torts, 2d ed., p. 306. "A theater ticket being a mere license to the purchaser which may be revoked at the pleasure of the theatrical manager upon such revocation, if the person attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser, and may be prevented from entering or may be removed by force, and can maintain no action of tort therefor. His only remedy is by an action on the contract to recover the money paid for the ticket and damages sustained by the breach of the contract implied by the sale and delivery of such ticket": 21 Ency. of Pl. & Pr. 647. Among the cases sustaining this are Wood v. Ledbitter, 13 Mees. & W. 838; McCrea v. Marsh, 78 Mass. 211, 71 Am. Dec. 745; Burton v. Scherpf, 83 Mass. 133, 79 Am. Dec. 717; Pearce v. Spalding, 12 Mo. App. 141; Johnson v. Wilkinson, 139 Mass. 3, 52 Am. Rep. 698, 29 N. E. 62; Greenberg v. Western Turf Assn., 140 Cal. 357, 73 Pac. 1050. In the light of these and other authorities a theater ticket is to be regarded as a mere license, for the revocation of which before the holder has actually been given his seat, and has taken it, the only remedy is in assumpsit for the breach of the contract.

Judgment affirmed.

THE LAW OF THEATERS AND LIKE SHOWS.

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I. Power to Regulate.

The legislature has power to regulate places of amusement, and may require them to be licensed by the proper authorities. Such legislation is sustainable as a legitimate exercise of the taxing power of the state, and also of its police power: Wallack v. Mayor of New York, 3 Hun, 84. And a city council has the right to prescribe reasonable ordinances regulating the actions of theatrical managers in the operation of their business: City of Cincinnati v. Brill, 7 Ohio, N. P. 534. The state has the power to speak in regulating places of amusement, and when it does so speak it is with absolute authority, and its express law supersedes the mere whim of pleasure of the proprietor, so he may no longer exercise his right to revoke the personal license contained in a ticket of admission: Greenberg v. Western Turf Assn., 140 Cal. 357, 73 Pac. 1050.

The legislature has constitutional power to enact laws regulating the observance of the Sabbath, and may prohibit theatrical performances or other shows or amusements on that day, and in this respect it is competent for the legislature to determine and declare what recreations or diversions are harmless and innocent, and therefore lawful, and what amusements operate injuriously upon others, or exert a baneful influence upon the community and thus tend to a breach of the peace, and should for that reason be prohibited, and if the legislature comes to the conclusion that certain amusements are hurtful and injurious to others, and tend to disturb the peace and tranquility of the public, the courts will not ordinarily, even if they have the power, sit in review of the judgment and discretion exercised by the law-making power in this regard: Neuendorff v. Duryea, 52 How. Pr. 267. A statute prohibiting exhibitions or dramatic performances on Sunday is constitutional and valid, the legislature being the sole judge of the acts proper to be prohibited, with a view to the public peace, and as obstructing religious worship, and as bringing into contempt the religious institutions of the people: Lindenmuller v. People, 33 Barb. 548.

It has been decided that a statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission after the opening of the doors, is an unconstitutional interference with the rights of private property: District of Columbia v. Saville, 1 McAr. 581, 29 Am. Rep. 616. And, on the other hand, it has also been held that an ordinance providing that it shall be unlawful for any person to sell reserved seats for a theatrical or other performance after the doors of the theater have been opened is not invalid, as being unreasonable: City of Cincinnati v. Brill, 7 Ohio, N. P. 534. If a statute prohibits, under a penalty, the exhibition or performance of any puppet show, wire, or rope dance, or any idle show, acts, or feats usually performed by common showmen, montebanks, or jugglers, circus performers are included within the prohibition of such

statute: Downing v. Blanchard, 12 Wend. 383. And white persons who, for gain or profit, appear in public dressed and disguised as negroes, and imitate their language and actions, sing negro songs, perform dances in a grotesque manner, and do pretended feats as psychologists and mesmerizers, are within the prohibition of such statute: Thurber v. Sharp, 13 Barb. 627.

Under a city charter authorizing its council to prohibit, segregate and regulate bawdy-houses and variety shows, and determine their keepers and inmates to be vagrants, an ordinance declaring that any place is a variety show where persons congregate together and engage in music and dancing, or plays and exhibitions, and liquor is sold, offered for sale, or given away to any person visiting such place, is invalid as being too vague, indefinite, and uncertain, beyond the power conferred by the charter upon the council, and containing none of the essential elements of a disorderly house as defined and denounced by law: Ex parte Bell, 32 Tex. Cr. Rep. 308, 40 Am. St. Rep. 778, 22 S. W. 1040. A statute conferring upon a city power to regulate and restrain theatrical amusements and authorizing the exercise of the taxing power as a means of restraining them, is not a law to tax theatrical amusements, and is not repealed by a subsequent statute relating to taxes on shows, and providing that nothing therein shall be construed so as to tax or prohibit any concert or any theatrical exhibition: Hodges v. Mayor etc. of Nashville, 2 Humph. 61.

II. Power to License.

The power to license theaters, shows, and places of public amusements, is undoubted. What is a reasonable license fee, under all of the circumstances of the case, must be left largely to the sound discretion of the municipal authorities, and unless the amount is so manifestly unreasonable, in view of its purpose as a police regulation, that it is apparent that the police power has been abused and made a pretext for doing what is forbidden, as, for example, imposing a tax, the courts ought not to, and will not, interfere with the municipal discretion. In respect to theatrical exhibitions and amusements of similar character, a larger discretion on the part of municipalities is recognized than in the case of ordinary trades and occupations, both because they are liable to degenerate into nuisances, and also because they require more police surveillance and police service: City of Duluth v. Marsh, 71 Minn. 248, 73 N. W. 962. The exaction of a reasonable theater license fee is in no sense the imposition of a tax, nor is it unconstitutional as impairing any vested right: Charity Hospital v. Stickney, 2 La. Ann. 550; Charity Hospital v. De Bar, 11 La Ann. 385. It is discretionary with the proper city authorities whether they will grant or deny a theatrical license, and such discretion when exercised is not reviewable by mandamus: People v. Board of Police, 36 Misc. Rep. 89, 72 N. Y. Supp. 583.

The proper city authority has discretion as to whether it will grant or refuse a theatrical license to a club which has a building apparently arranged for prize fights, which advertises prize fights, and which apparently has no other purpose in obtaining a license than to carry on public prize fights upon the premises. In such case the grant of a license is properly refused: People v. Wurster, 14 App. Div. 556, 43 N. Y. Supp. 1088. If a license to conduct a house of entertainment is granted by a city ordinance on condition of the payment of a certain tax, such payment is a condition precedent to the right to exercise the license, though such tax is illegal: Sights v. Yarnalls, 12 Gratt. 292. A payment of a fine for a violation of law in failing to take out a theatrical license is no legal bar to the right to collect such license fee: Nurdlinger v. Irvine (Pa.), 4 Atl. 166.

A city after receiving a license fee for public amusements, and permitting a public dance to be conducted under the license thereby obtained, cannot claim, after stopping the dance, that the license did not authorize such dance, and that, therefore, the license fee was voluntarily paid and the unearned portion could not be recovered back, but, on the contrary, upon revoking such license, the city is bound to return the unearned portion of the license fee: Pearson v. City of Seattle, 14 Wash. 438, 44 Pac. 884.

III.. Performances for Which License may be Required.

A statute providing for the licensing and regulation of places of amusement includes all classes of public exhibitions, such as are usually conducted upon a stage for the observation and amusement of the public. Hence a place of public amusement where concerts are given upon a stage is within its terms and requires a license: Mayor of New York v. Eden Musee Am. Co., 102 N. Y. 593, 8 N. E. 40.

A license to keep theater will not protect one who, by contract with the licensee, exhibits therein feats of legerdemain or sleight-of-hand: Jacko v. State, 22 Ala. 73. A dance hall to which the public is admitted upon the payment of a small fee is a public amusement within the meaning of a statute requiring a license for "theatrical exhibitions, public shows, and exhibitions of any description": Commonwealth v. Quinn, 164 Mass. 11, 40 N. E. 1043. And a merry-go-round maintained in an inclosure opening upon a public street, where music is furnished without charge, but a charge is made for riding upon "flying-horses," is a public amusement requiring a license within the meaning of such statute: Commonwealth v. Bord, 177 Mass. 347, 58 N. E. 1017. Impromptu characterizations, if performed on successive nights in a public hall, for admission to which a price is charged, are within a statute requiring a license for dramatic entertainments: Society for Reformation etc. v. Diers, 10 Abb. Pr., N. S., 216. A public dance is a public amusement within the meaning of an ordinance imposing a license fee on "every theater, opera, concert or other public amusement that is given in or connected with any saloon": Pearson v. City of Seattle, 14 Wash. 438, 44 Pac. 884.

The performance of an opera is a theatrical exhibition within the meaning of a statute, providing that no theatrical exhibition shall be allowed in the state without a license first obtained, fixing the price of such license, and providing for the manner in which it may be obtained: Bell v. Mahn, 121 Pa. St. 225, 6 Am. St. Rep. 786, 15 Atl. 523, 1 L. R. A. 364. This case overrules Rowland v. Kleber, 1 Pittsb. Rep. 68, holding that an opera company could not be required to pay the license imposed by such statute.

Horseraces exhibited within inclosures, and to which the public is admitted upon the payment of an admission fee, are shows and amusements within the meaning of a statute authorizing the imposition of a license fee upon theatrical and other exhibitions, shows and amusements: Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70.

In State v. Scaffer (Minn.), 104 N. W. 139, it appeared that a city ordinance imposed a license on "shows of all kinds, circuses, places of amusement and museums for which money is charged for entrance into the same, and it was held that the clause, "for which money is charged for entrance into the same" refers to "museums" only, and does not qualify any preceding word or subject, and that a theater in which two performances are given daily by hired performers is within the class designated in the ordinance as "places of amusement," and is subject to a license fee, although no fee is charged for admission to certain parts of such theater. Failure to take out a license for the giving of such exhibitions as are required to be licensed makes the owner or manager liable for the penalty imposed for failure to take out such license: Bostick v. Purdy, 5 Stew. & P. 105; Commonwealth v. Twitchell, 4 Cush. 74; People v. Kolb, Abb. App. Dec. 529.

IV. Performances for Which License is not Required.

As a general rule, shows and exhibitions of any kind, given free of charge or contribution of any kind, are not subject to pay a license fee: State v. Lundie, 47 La. Ann. 1596, 18 South. 636. And a statute prohibiting the setting up or maintaining without a license, of any public show, amusement, or exhibition, does not apply to nor include, a school for the teaching of dancing, although a charge is made for admission thereto: Commonwealth v. Gee, 6 Cush. 174. Nor can a license fee be exacted from one who keeps a permanent establishment for exhibition of natural and artificial curiosities, for admission to which visitors are charged a fee, under a statute charging a license fee against "every keeper of a transient theater, circus, menagerie, or other public exhibition or show": City of New Orleans v. North, 12 La. Ann. 205.

A musical conservatory, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for an opera-house

license: Markham v. Southern Conservatory of Music, 130 N. C. 276, 41 S. E. 531.

Letting a small room in the upper part of a building for petty dramatic exhibitions, in the profits of which the lessor has no interest, does not constitute carrying on or maintaining a theater, for which a license must be taken out: Gillman v. State, 55 Ala. 248.

It has been decided, though doubt must be expressed as to the correctness of the decision, that a skating-rink to which an admission fee is charged, is not within the meaning of a statute requiring a license to be taken out for "public performances or exhibitions": Harris v. Commonwealth, 81 Va. 240, 59 Am. Rep. 666.

V. License Includes What Shows.

A license upon the privilege of "keeping a theater, opera-house, or concert hall where theatrical entertainments are given," includes entertainments given by companies hired by the proprietors or lessees, and such companies are not liable to an additional license, nor are such "theatrical entertainments" confined to the pure drama, but may include negro minstrel performances: Taxing Dist. v. Emerson, 4 Lea, 312. Outside free shows, such as "Punch and Judy," "balloon ascensions," and "processions" to attract the crowd to the main performance, where an entrance fee is charged, are included within the license of the latter: State v. Lundie, 47 La. Ann. 1596, 18 South. 636.

VI. Rights Connected With Tickets of Admission.

As a general rule, the sale of a ticket of admission to a theater, concert, show, or place of amusement of any kind is a mere revocable license to enter the building or inclosure and remain during the performance, and if revoked after the entrance of the purchaser, and he refuses to depart upon request, he becomes a trespasser, and may be removed by such force as is necessary to overcome his resistance, and for such removal trespass will not lie, his only remedy being an action for the breach of the contract: Burton v. Scherpf, 1 Allen, 133, 79 Am. Dec. 717. A theater ticket is merely a revocable license to enter a part of the theater specified upon it, and if, before the holder has entered, the licensor, with no more force than is necessary for the purpose, prevents him from entering, he cannot maintain an action of tort for the exclusion, though he may in an action of contract recover the money paid by him for the ticket, and all damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket: McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745. A theater ticket is a revocable personal license, given by the theater proprietor to the purchaser to enter the theater for the purpose of witnessing a performance, and it is competent for such proprietor to refuse to recognize theater tickets purchased by a ticket speculator from one of the proprietor's authorized agents and sold by the speculator outside of the theater to persons seeking admission thereto, and to warn persons intending to purchase tickets from the speculator, that such tickets will not be accepted, although the au-

thorities of the city in which the theater is located have issued to the ticket speculator a license authorizing him to carry on that business: Collister v. Hayman, 71 App. Div. 316, 75 N. Y. Supp. 1102. The proprietor of a licensed place of amusement has the right to exclude a person from entering the premises, although such person has purchased a ticket of admission, and the only remedy of the person so excluded is to sue to recover his money back. Such proprietor has also the right to annex to the ticket of admission issued by him the condition that it is not transferable, and that, if transferred, it shall be worthless. In such case the transferee has no right of admission, and the person to whom the ticket was originally issued has no right of action to recover the price paid for the ticket upon the refusal of the proprietor to admit the transferee thereof. If the original purchaser has a right of action to recover back his money after the transfer of such a ticket, it is only after he has personally presented the ticket and demanded admission thereon and been refused: Purcell v. Daly, 19 Abb. N. C. 301.

Dicta are found to the effect that a theater ticket is more than a mere revocable license. In Drew v. Peer, 93 Pa. St. 234, Mr. Justice Sterrett said, though it was not necessary to the decision of the case, that, "We incline to the opinion, however, that as the purchasers and holders of tickets for particular seats, they had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress and exclusive possession of the designated seats during the performance on that particular evening."

The state may by statute take away the power of the proprietor of a place of amusement to revoke the license of a ticket of admission. Hence, a statute providing that the aggrieved party excluded from any place of amusement, including a racetrack, may recover his actual damages for such exclusion, and one hundred dollars in addition thereto, is a valid and constitutional exercise of the police power, and such statute supersedes the mere whim of the proprietor of a place of amusement, so that he may no longer revoke the personal license of a ticket of admission, subject to responsibility merely for the price thereof and necessary expenses incurred in attending the place of amusement: Greenberg v. Western Turf Assn., 140 Cal. 357, 73 Pac. 1050.

Damages for exclusion or expulsion from a racetrack or other place of public amusement are limited to the deprivation of the privilege enjoyed by the plaintiff in common with the remainder of the public in attending the place of amusement, and an injury to the plaintiff's business in publishing a paper devoted to racing news and furnishing racing "dope" cannot be considered an element of damage, and cannot justify evidence of subsequent exclusions from the racetrack, other than the one charged in the complaint: Greenberg v. Western Turf. Assn., 140 Cal. 357, 73 Pac. 1050. A patron who has, at the invitation of the proprietor, paid the admission fee and en-

tered the hall where an entertainment is being held, cannot be turned out of such hall except for cause, and if he is wrongfully expelled, he is entitled to recover damages for the indignity and disgrace of a public expulsion, and while not entitled to recover exemplary damages, his right of recovery is not limited to the price which he paid to secure admission to the hall: Smith v. Leo, 92 Hun, 242, 36 N. Y. Supp. 949.

The proprietor of a theater who advertises the price of reserved seats during a certain period, and that the sale of seats will begin at a certain time, is not bound to sell any chosen seat for the entire period to the person who first presents himself and tenders the price of it: Pearce v. Spaulding, 12 Mo. App. 141.

The neglect of the proprietor of a theater to market a certain seat as "taken," cannot give a stranger any right to such seat which has already been purchased by a third person: Commonwealth v. Powell, 12 Phila. 180.

If any person visiting a circus or other place of public amusement violates any rule provided for the conduct of visitors, or is guilty of any disturbance or disorder not amounting to a breach of the peace, his arrest or any assault or attack upon him is not justified. Such violation, disturbance, or disorder may be of such character as to justify his expulsion; but the proprietor of the place of amusement or his employés before assaulting such person must first order him to leave, and upon his refusal, can use only such force as is necessary to remove him from the place: State v. Walker, 1 Ohio Dec. (Reprint) 353.

VII. Speculators' Tickets.

It is competent for the proprietor of a theater to refuse to recognize tickets purchased by a ticket speculator from one of the proprietor's authorized agents and sold by the speculator outside the theater to persons seeking admission thereto, and to warn persons intending to purchase tickets from such speculator that they will not be accepted, notwithstanding the fact that the city authorities where the theater is located have issued to such speculator a license authorizing him to carry on the business of speculating in theater tickets: Bollister v. Hayman, 71 App. Div. (N. Y.) 316, 75 N. Y. Supp. 1102. A speculator who buys theater tickets becomes in effect an agent of the theater, and is liable the same as the agent in the box office for a violation of an ordinance prohibiting any person selling reserved seats for a theatrical performance after the doors of the theater have been opened: City of Cincinnati v. Brill. 7 Ohio N. P. 534.

VIII. Care Required of Proprietor or Manager.

The proprietor of a hall to which the public is invited and admission charged for amusement there provided is bound to use ordinary care and diligence to put and keep such hall in a reasonably safe condition for persons attending in pursuance of such invitation, and if he neglects his duty in this respect, so that the hall is in fact un-

safe, his knowledge or ignorance of the defect is immaterial: Currier v. Boston Music Hall Assn., 135 Mass. 414. A person erecting and maintaining a hall for public exhibitions must use reasonable care in the construction, maintenance, and management of it, having regard to the character of the exhibitions given therein, and the customary conduct of spectators who witness them, and he cannot escape liability if he was negligent in the manner in which the guard-rail in front of the gallery in the hall was constructed and maintained, and if a spectator who was injured by the falling of the guard-rail during an exhibition given in the hall, was in the exercise of due care, on the ground that other persons may have contributed to the injury: Schofield v. Wood, 170 Mass. 415, 49 N. E. 636. A person occupying a paid seat in a grandstand of a racing association for the purpose of seeing certain races is not entitled to the care required of a carrier toward a passenger, but such association is liable only for failure to exercise reasonable care not to create or permit conditions endangering visitors who are in seats provided for their use: Williams v. Mineral Park Assn., 128 Iowa, 32, 111 Am. St. Rep. 000, 102 N. W. 783, 1 L. R. A., N. S., 427. If a patron while changing his seat in the gallery of a theater slips or stumbles, and falls over two adjacent rows of persons and the guard-rail, into the body of the house, and sustains serious injury, he cannot recover on the ground that it was negligence for the theater manager to fail to provide a second guard-rail for the gallery to prevent such an accident, nor can a claim of negligence predicated upon the fact that the floor of the gallery sloped at an angle of forty-five degrees be made to avail, when such fact was apparent and well known to the person injured: Dunning v. Jacobs, 15 Misc. Rep. 85, 36 N. Y. Supp. 453. An action may be maintained against the owner of a hall, who is licensed to give public exhibitions in it, and who receives from the manager of a polo team a certain sum for the use of the hall and one-half of the net receipts for admissions, for personal injury to a spectator of a polo game, exercising due care, caused by the falling of the guard-rail in front of the gallery, upon which he, with others, was leaning during the progress of the game, such rail being improperly constructed and fastened and insufficient in strength to withstand the pressure of large numbers leaning upon it, and the owner being aware that they were accustomed to do so: Schofield v. Wood, 170 Mass. 415, 19 N. E. 636. And the owner of a building, who by written agreement has leased it to another for four nights to be used for the purpose of giving entertainments therein, and who is to have control of all money in the box office until a certain sum has been paid each night, is liable for injury caused to a patron by the falling of a platform in front of the entrance, and reached by a flight of stairs upon which he was standing with others, while waiting for the doors to open before the entertainment: Oxford v. Leathe, 165 Mass. 254, 43 N. E. 92. In Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282, it appeared that plaintiff had been at-

tending a ball in a public hall in the third story of an inn, and on coming away, instead of descending two flights of stairs, went out of a door left unlocked at the foot of the upper flight, and opening upon the roof of a piazza, and walking along thereon stepped off the unguarded end of it, and fell to the ground. A verdict for the plaintiff against the owner of the building was sustained on the ground that by letting the hall, he held it out to the public as safe, and was bound to render the approaches thereto and means of egress safe.

The proprietor of a theater is not a bailee of an overcoat of a patron, who hangs it on a hook in a box occupied by him while witnessing a play: Pattison v. Hammerstein, 39 N. Y. Supp. 1039.

A peace officer employed at a circus or other place of public amusement does not, while acting in the discharge of his duties, possess any other or greater rights than a private individual who might be so employed in enforcing any rules or regulations provided for the conduct of the visitors to the show. Nor has such officer while so employed any greater or other power than he would have in any other place, and if he exceeds his authority and exercises undue force toward a patron of a show, or commits an unwarranted assault upon him, the proprietor of the show is liable in damages therefor: State v. Walker, 1 Ohio Dec. (Reprint) 353.

IX. Obstructing Aisles or Passageways.

The provision of the statute relating to the construction of passageways and exits in theaters, declaring that they shall be kept free from chairs, etc., and that no person shall be allowed to stand therein during any performance, must be literally construed, and does not give the manager or proprietor of a theater any discretion to allow persons to stand in the aisles or passageways, even though the number be not so great as to prevent free exit in case of danger: Fire Department of New York City v. Stetson, 14 Daly, 125. To recover the penalty given for the violation of such statute, it is not necessary to prove that the manager of the theater knew any person was standing in the passageway at the time in question, or that he gave permission to anyone to occupy such passageway. The fact that a number of tickets were sold for a performance by defendant's agents, after they knew that all of the seats in the house were filled, is sufficient proof to sustain a judgment in the absence of evidence that such sale was in opposition to the theater manager's wishes: Fire Department of New York City v. Stetson, 14 Daly, 125; Fire Department of New York v. Hill, 14 N. Y. Supp. 158. In an action to recover a statutory penalty for allowing persons to stand in the passageway of defendant's theater during a performance, it appeared that he was the lessee of the theater, but had let to another the privilege of giving performances therein, but furnishing ticket-sellers, ticket-takers, and ushers, who were paid by the defendant, though subject to the orders of the person giving the performances, and that it was by the latter that the persons who crowded the passageway

on the occasion in question were admitted, though the defendant had notice of such crowding at previous performances. It was held that this authorized a finding that the defendant allowed the passageway to be obstructed as complained of, and that a judgment for the amount of the penalty should not be disturbed on appeal: Fire Department of New York City v. Hill, 14 N. Y. Supp. 158.

If a theater has a front and side entrance, both of which are permitted to be used, and people are permitted to stand in a space necessary for a passageway in the use of the side entrance alone, the manager of the theater is liable for the statutory penalty imposed on him for permitting or causing anyone to occupy a passageway in a theater during a performance therein: Sturgis v. Hayman, 84 N. Y. Supp. 126. Under a statute providing for the punishment of any manager or employé of a theater who shall allow any obstruction to remain in an aisle thereof, the word "aisle" means the aisle of a theater as actually constructed, and not a theoretical aisle of the minimum width permissible under the building code of the city, and a manager of a theater who allows patrons to occupy stools or chairs in a side aisle of the theater as constructed, and refuses to remove them on notice, is liable to the penalty imposed: Sturgis v. Coleman, 38 Misc. Rep. 302, 77 N. Y. Supp. 886.

X. Civil Rights.

In the absence of valid legislation to the contrary, the owner or manager of a theater or other place of public amusement may make and enforce a rule requiring colored persons to occupy separate seats and a separate portion of the building from white persons. Such rule is a reasonable regulation, and is not in conflict with, nor in violation of, the fourteenth amendment to the constitution of the United States: Younger v. Judah, 111 Mo. 303, 33 Am. St. Rep. 527, 19 S. W. 1109, 16 L. R. A. 558. But in the absence of any regulation in a theater in regard to color, where a colored person is refused admission on a ticket the proprietor is liable in damages therefor in an action of trespass on the case, and if in such case he is forcibly ejected from the theater, he is entitled to recover the price of the ticket and for the personal injury done him by such ejectment: Drew v. Peer, 93 Pa. St. 234.

The exclusion of a colored man from an unlicensed public rink kept for hire, on account of his race, is not illegal: Bowlin v. Lyon, 67 Iowa, 536, 56 Am. Rep. 355, 25 N. W. 766. The decision in this case was placed upon the express ground that maintaining such a rink was essentially a private business and must so remain until the public assumed some control over it by imposing a license or otherwise. The court said: "As the place belonged to them, and was under their exclusive control, and the business was a private business, it cannot be said, we think, that any person had the right to demand admission to it. They had the right at any time to withdraw the invitation, either as to the general public or as to private individ-

uals'': Bowlin v. Lyon, 67 Iowa, 536, 56 Am. Rep. 355, 25 N. W. 766. The same conclusion was reached in Commonwealth v. Sylvester, 13 Allen, 247, where it was maintained that no action could be maintained against a keeper of a billiard-room for refusing to allow a negro to play billiards therein, on account of his color, unless the billiard-room was licensed under the statute.

Many of the states of the Union have enacted statutes providing, in effect, that no person can, by reason of race, color or previous condition of servitude, be excluded from the equal enjoyment of any accommodation furnished by the owners, managers or lessees of theaters or other places of amusement. Such statutes are constitutional and a valid exercise of the police power of the state: People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389, 18 N. E. 245, 1 L. R. A. 293. Under such statutes it has been decided that if the proprietor of a theater denies to a colored person access to his theater, or to the several circles or grades of seats therein on account of his race or color, he is liable to such person in an action for damages: Baylies v. Curry, 128 Ill. 287, 21 N. E. 595, affirming Baylies v. Curry, 30 Ill. App. 105, where it is further held that it is a violation of such a statute to require colored persons, patrons of a theater, to occupy particular rows of seats. Under such statutes the proprietor of a theater is liable in damages for rudely refusing to admit a colored person to his theater, solely on account of his being colored: Joseph v. Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375. And for refusing a colored person admission to a skating-rink solely on account of his color: People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389, 18 N. E. 245, 1 L. R. A. 293. Or for forcibly ejecting him from a place of amusement because of his color: Cremore v. Huber, 18 App. Div. 231, 45 N. Y. Supp. 947.

If a colored person has paid his entrance fee to a place of amusement, and is behaving himself properly, it is not his duty to leave because he is requested to do so by the proprietor, and in an action brought by him to recover for an alleged assault for having been forcibly ejected from, and denied the privileges of a place of amusement because of his color, he may prove, as part of the res gestae, that he was insulted by patrons of the entertainment before he was ejected by the servants of the proprietor, although the latter cannot be held liable for the acts of such patrons: Cremore v. Huber, 18 App. Div. 231, 45 N. Y. Supp. 947.

Horseracing is a public amusement, and a racing association is under public obligation to admit all citizens who comply with its reasonable regulations, and a person who has been unlawfully refused admission to a race meeting held by such association is entitled to invoke the remedy afforded by a civil rights statute providing that all persons shall be entitled to full and equal privileges in all places of public amusement, subject only to the conditions and limitations prescribed by law, and applicable alike to all citizens:

Grannan v. Westchester Racing Assn., 16 App. Div. 8, 44 N. Y. Supp. 790.

XI. Contracts of Performers.

The subject of contracts for personal services between theatrical or show managers and actors, actresses and performers, together with the remedy for a breach thereof, is fully treated in the note to Philadelphia Ball Club v. Lajoie, 90 Am. St. Rep. 647-650, and will not be touched upon here.

HOLBROOK'S ESTATE.

[213 Pa. St. 93, 62 Atl. 368.]

WILLS—Gift in Restraint of Marriage.—If a person is by will given the income of a fund during her natural life, or so long as she remains unmarried, with a gift over in case of her death or marriage, the gift is upon a limitation in favor of the beneficiary during the period she remains unmarried, and is not unlawful nor invalid as a condition in restraint of marriage. (p. 539.)

J. G. Johnson, for the appellant.

N. D. Miller, J. J. Wilkinson and J. Mellors, for the appellees.

[94] MITCHELL, C. J. In Pennsylvania the right of a man to do as he will with his own has always been liberally construed. Accordingly, a donor, not under any obligation to give, may give with such conditions as he pleases, subject only to the restriction that the conditions shall not be clearly illegal. Thus a man may not settle his own property on himself so as to keep it out of the reach of [95] his creditors, for that would lead directly to fraud. But a parent or other person, not bound to give at all, may give on a spendthrift trust, though the gift is thus placed beyond the reach of the donee's creditors.

In considering any restriction there is no presumption of illegality. On the contrary, the presumption is in favor of innocence and validity. The particular restriction which we have in this case belongs to the class known in general terms as in restraint of marriage, and is claimed to be void as against the policy of the law. The general rule must be conceded. But it has no sound basis, either historically or logically, as is apparent from the various origins assigned to it, and the refinements, subtleties and inconsistencies in its application. The old lawyers used to say there were

three favorites in the law—life, liberty and marriage, and Coke attributes the origin of the rule to this favor. Other authorities find its origin in the civil law, others again in the canon law, and finally in some of the more modern cases it is based on the policy of the law for the promotion of morality, which is certainly a far-fetched and unsubstantial reason in view of the admitted exceptions. Thus, for example, it is difficult to see why such a restriction tends to immorality in a gift of personalty but does not in a gift of realty, or if the divestiture of an estate by marriage has the same tendency, why a limitation of the estate to a continuance unmarried should not. Yet these distinctions are as firmly settled as any in the law: Lancaster v. Flowers, 198 Pa. St. 614, 48 Atl. 896; Hotz' Estate, 38 Pa. St. 422, 80 Am. Dec. 490. The curious will find this subject learnedly discussed in the argument of Mr. Hare and the opinion of Kennedy, J., in McIlvaine v. Gethen, 3 Whart. 575, and the opinion of Chief Justice Gibson in Commonwealth v. Stauffer, 10 Pa. St. 350, 51 Am. Dec. 489.

Nor does the rule stand any better considered logically. It started apparently with a prohibition of all restrictions against liberty of marriage: McIlvaine v. Gethen, 3 Whart. 575. Distinctions and exceptions one after another sustained prohibitions which went merely against time or place, or particular persons, conditions with a gift over on breach, conditions in a gift of land, and finally the distinction between conditions subsequent, working a divestiture, and conditions limiting the estate given. This last distinction is logical [96] enough, for where there is an estate given and the condition is held void, there is still the estate which may continue, while where the estate itself is to last only so long as the condition is fulfilled there is nothing left after the breach. But while this distinction is logical, it is dry technical logic with no basis of substantial reason for application in the affairs of life. It is a reproach to the law that of two donors intending to do exactly the same thing one shall succeed and the other fail as a violator of law merely because one scrivener knew what he was about and wrote "so long as the donee remains unmarried," and the other was ignorant or careless and wrote "for life if so long the donee remains unmarried": Hoopes v. Dundas, 10 Pa. St. 75.

So strongly have the courts of Pennsylvania felt the undesirability of interference with the right of free disposition of property by the rule invoked in this case, that the steady tendency has been to recognize and encourage exceptions which substantially eat out the rule itself. We share the views which have produced this result, and while we will recognize and follow the adjudicated cases which may be properly regarded as having settled rules of property, yet we are not disposed to enlarge the scope of the principle or to apply it to new and questionable cases.

The present controversy arises over the legacy of the testatrix to the appellant of the income of a fund "during the term of her natural life, or so long as she remains unmarried," with a gift over "in case of her death or marriage." The primary rule is to give effect to the intention of the testatrix, and the presumption is that the intent was lawful. The form in which she expressed her will is unimportant except as indicating her intent. There is nothing in this will clearly indicating an intent to prohibit marriage. The words are equally appropriate to express an intent to supply an income to the legatee so long as she was unmarried and presumably dependent on her own exertions for her maintenance. This is a perfectly lawful intent though its practical effect may be to discourage marriage. Even regarding the language of the gift as ambiguous in being equally capable of two constructions, we must give it the one that will preserve the testatrix's right to dispose as she pleased of her property.

97 There was a gift over on the happening of death or marriage. In Cornell v. Lovett's Exr., 35 Pa. St. 100, and Mickey's Appeal, 46 Pa. St. 337, restrictions much more clearly conditions subsequent devesting the legacies than that in the present case, were expressly held to be valid.

The decree is affirmed.

Conditions in Restraint of Marriage are considered in the monographic note to Chapin v. Cooke, 84 Am. St. Rep. 147-152. There is a commendable tendency on the part of many courts to break away, to no inconsiderable extent, from the old doctrine that such conditions are void as opposed to public policy: See the monographic note to Wakefield v. Van Tassell, 95 Am. St. Rep. 215-217.

McCAUSLAND'S ESTATE.

[213 Pa. St. 189, 62 Atl. 780.]

MARRIAGE—Common-law Marriage—Legitimacy of Child.—If the father and mother of a child, soon after its birth, agreed with each other in one state to become, and live together as, husband and wife until parted by death, thereafter continuing to live together as, and holding themselves out to the world to be, husband and wife, such contract of marriage legitimates their child not only in that state but also in another state where a common-law marriage is recognized as valid. (p. 542.)

MARRIAGE—Validity—Presumption—Legitimacy.—If a married man disappears and is not heard from for seven years, it is presumed that he is dead; but there is no presumption as to the actual time when, during such seven years, his death actually occurred, and if his wife remarries within the seven years, in the absence of proof of the actual date of such death, the presumption is in favor of the legitimacy of a child of the second marriage, and in favor of the validity of that marriage as not having occurred prior to the death of such absent husband. (p. 543.)

V. E. Williams, A. M. Sloan and W. F. Wegley, for the appellant.

W. S. Byers and J. A. C. Raffner, for the appellee.

191 BROWN, J. This is an appeal from the decree of distribution in the estate of Anna McCausland, deceased, By the seventh clause of her will she devised to her daughter, Jane B. Stuart, the appellant, and to her son, Jacob W. McCausland, the rents, issues and profits issuing from her real estate in Greensburg, and provided that "if either one survive the other, then during the lifetime of the one surviving one-half to him or her and the other half to the child or children of the one deceased." Jacob W. McCausland, the son, died on January 18, 1903, and one-half of the fund in the hands of the accountant is now claimed by the Safe Deposit and Trust Company of Greensburg, Pennsylvania, guardian of Jacob Welty McCausland, found by the court below to have been the legitimate son of Jacob W. McCausland, the son of the testatrix. The legitimacy of the ward of the appellee is the single question before us.

The court below having found the boy to be the legitimate son and only child of Jacob W. McCausland, deceased, awarded his guardian one-half of the fund brought before it for distribution. 192 We are not asked by any of the assignments to say that error was committed in receiving

the testimony of witnesses, upon which the court's findings were based, but it is urged that from this testimony there ought to have been a finding that the ward of the appellee was not the legitimate child of the son of the testatrix, and, therefore, not entitled to a portion of her estate under the seventh clause of her will.

Elizabeth McCausland, the mother of Jacob Welty McCausland, found by the court below to have been the lawful wife of Jacob W. McCausland, the son of testatrix, was the daughter of John and Sarah M. Evans, and prior to March 26, 1882, had lived with her mother at Hannibal, Missouri. On that day, when she was about twenty-five years of age, she was married to one John E. Rodgers, and lived with him until some time in the year 1884. The findings of the court below are, that during this period Rodgers frequently told her she was not his wife, as they had not been legally married, because the man who performed the ceremony was not an alderman or justice of the peace; that on August 3, 1885, she saw him at the Union Depot, in the city of Denver, for the last time, since which date he has never been heard of by anyone connected with or interested in this case; that she then went to Hannibal, Missouri, on a visit to her mother, and, returning in about a month, took up her residence, in September, 1885, with Jacob W. McCausland, the deceased son of the testatrix; that she and he lived together continuously until his death, January 18, 1903; that she gave birth to a son, the ward of the appellee, on March 4, 1887; that this child was called Jacob Welty McCausland, and was recognized by Jacob W. McCausland, deceased, as his son; that about six weeks after the birth of the child she and the said Jacob W. McCausland agreed with each other to become husband and wife and to live together in that relation until parted by death; that they did continue to live together as husband and wife, she performing all the duties of a wife to him and of a mother to the boy; that Jacob W. McCausland introduced her as his wife; that telegrams, by his direction, were addressed to her as Mrs. Jacob McCausland; that he had himself registered as a married man in the city of Denver, Colorado, and they were known and recognized in the community where they lived as husband and wife; [193] that the boy was always recognized by him as his son, and, at his death, by his will he named and acknowledged Elizabeth McCausland as his wife and Jacob

Welty McCausland as his son, and gave all of his property to them as such.

It is conceded, first, that by the laws of Colorado, the common-law marriage prevails there just as it does in this state; second, that there is a presumption there, as well as here, of the death of a person who has been absent and unheard of for seven years; and, third, that the subsequent marriage of the parents of children legitimatizes those born prior to the marriage. The seventh section of chapter 27 of the general statutes of the state of Colorado provides that "illegitimate children shall inherit the same as those born in wedlock, if the parents subsequently intermarry, and such children be recognized after such intermarriage by the father to be his." Our act of May 14, 1857 (Pub. Laws 507), is of similar import. It is: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock and cohabit, such child or children shall thereby become legitimated, and enjoy all the rights and privileges as if they had been born during the wedlock of their parents."

That the marriage of Jacob W. McCausland to Elizabeth Rodgers was valid, if she were not under a disability existing from her marriage to John E. Rodgers, who might still have been alive, cannot be questioned. It was not only valid in Colorado, where they agreed to become husband and wife, but it would have been valid if entered into here as it was there, and the law of neither state puts the brand of bastardy upon their issue. When their babe was six weeks' old they agreed to become husband and wife, and to live together in that relation until death should part them. From that moment, if they were competent to make the solemn compact, their babe was no longer the son of no one, but the child of parents wedded as lawfully as if their marriage had been solemnized by pomp and religious ceremony; and their simple vows, made over a cradle, were kept to the end. The father, on January 10, 1903—but eight days before his death—declared in his will that Elizabeth McCausland was his beloved wife and that Jacob W. McCausland was his son.

When Jacob Welty McCausland was born, on March 4,
194 1887, John E. Rodgers had not been seen or heard from for a period of nineteen months. He was last seen on August 3, 1885; so that on August 3, 1892—seven years afterward—he was presumed to be dead. For nearly eleven

years after that date the woman he had married continued to live as the wife of Jacob W. McCausland, without hearing anything from him or about him, and up to the day of the audit in the court below nothing had been heard from him. By the laws of Colorado and this state he was presumed to be dead on August 3, 1892. Even if Elizabeth McCausland had been under disability before that day to enter into a lawful marriage contract with Jacob W. McCausland, it then presumptively disappeared, and thereafter, in the absence of proof that her former husband was living, she could become the lawful wife of Jacob W. McCausland. Though seven years must elapse before the presumption of death arises, when this period does elapse there is no presumption as to the time when, during the seven years, the death of the absent party actually occurred, and, therefore, to help the presumption of innocence or legitimacy, there is no presumption that it occurred after the second marriage, but rather that it occurred before. Semper praesumitur pro matrimonio. This is, of course, but a presumption to be rebutted by proof, with the actual date of the death; but in the absence of such proof, with the presumption in favor of legitimacy, the presumption is in favor of the validity of the second marriage as not having occurred prior to the death of the absent husband: 1 Greenleaf on Evidence, sec. 41; 1 Bishop on Marriage and Divorce, secs. 949-953; Senser v. Bower, 1 Penr. & W. 450; Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477. Under the facts found, the only conclusion that could be arrived at was reached by the learned judge of the court below, and his decree is affirmed and the appeal dismissed, at the cost of the appellant.

The Validity of a Marriage contracted by an abandoned spouse is discussed generally in Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51; note to State v. Lowell, 79 Am. St. Rep. 374. And the presumption in favor of the validity of such a marriage is considered in the note to Pittinger v. Pittinger, 89 Am. St. Rep. 198-206.

BRYAN v. DOUDS.

[213 Pa. St. 221, 62 Atl. 828.]

STATUTE OF FRAUDS—Execution Sales.—A parol agreement to purchase land at execution sale, and resell it, and after deducting the purchase money and expenses, to pay the balance to the execution defendant, is within the statute of frauds, and cannot be enforced. (p. 546.)

W. A. McConnell, for the appellants.

R. Ritchie, R. S. Holt and D. K. Cooper, for the appellees.

The supreme court adopted the opinion of the lower court and affirmed its decree. Such opinion was as follows:

[222] WILSON, P. J. The substance of plaintiff's bill is found in the fourth paragraph, in this language: "The said Oliver A. Douds undertook and agreed, being a cousin of your orators, to buy in said lands at a sheriff's sale which would be made thereof, and hold the said lands for your orators until the same could be sold, at which time he would pay to himself whatever moneys he had advanced for the purpose aforesaid, and to pay the balance to your orators." It is not alleged in the bill that the contract was reduced to writing and signed by Oliver A. Douds. The supreme court in interpreting the act of 1858, in Barnet v. Dougherty, 32 Pa. St. 371, said: "The plain meaning of this enactment is, that a trust in land can now be proved in no other way than by writing. The proviso, indeed, excepts from its operation resulting trusts, such [223] as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. Payment of the purchase money subsequently is not sufficient to raise a legal implication of a trust as all the authorities show."

In Kellum v. Smith, 33 Pa. St. 158, the supreme court said: "When the purchaser at a sheriff's sale promises to hold for the debtor, and afterward refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement."

In unmistakable language in the case of Phillips v. Hull, 101 Pa. St. 567, the supreme court says: "The plaintiff

owned and was interested in judgments against the defendant in error aggregating about eleven thousand dollars. The latter seeks to recover on a parol agreement made with the plaintiff in error, by which he was to sell the land at sheriff's sale, buy it, and hold it until a private sale thereof could be made, and after the amount due to him was paid, the defendant in error was to have the residue. The latter was to advance nothing, to pay nothing. Without his assent the plaintiff could have sold. The defendant made no agreement that he would afterward purchase the land at any price. If this were the whole case it is very clear the defendant in error could not recover. As the purchase was made, and the money paid by the same person, a refusal to fulfill the agreement is no more than the violation of a parol agreement, and equity will not decree the purchaser to be a trustee."

In the case of Dollar Savings Bank v. Bennett, 76 Pa. St. 402, the supreme court also said: "It is essential to maintain this action that the promise or undertaking of the defendant should be founded upon a sufficient legal consideration —either some benefit to the promisor or some injury to the promisee. Nothing is clearer in principle or better settled by authority than that a mere naked verbal agreement by a purchaser at a sheriff's sale, with his own money, that he will hold the premises in trust for the defendant—neither vests any equitable estate in the defendant under the statute which prohibits parol declarations [224] of trust—so that no claim to the money could exist to him under the common count, nor does it give any ground for an action, being a mere nudum pactum. The mortgagees had a legal right to proceed on their judgment bond and to become the purchasers at the sale—if they were the highest and the best bidders."

There is no allegation in this bill that there was any fraud practiced by the defendant at any time, except in withholding the residue after payment of the amount advanced by him and his expenses. He being the owner of the judgment of Margaret A. Holt, and also the Gaily mortgage, purchased the property at sheriff's sale, the plaintiffs allege, under this agreement to hold it for them; and there being no fraud at the time the purchase was made by the defendant of the properties in question at sheriff's sale, his agree-

ment to hold the same for them until it was sold, and give them the residue, was clearly a nudum pactum, and the plaintiffs have no ground of action.

In the case of McCloskey v. McCloskey, 205 Pa. St. 491, 55 Atl. 180, the supreme court has further said: "Though the trust is set forth as an express one, created by parol, the applicants seek to avoid the act of 1856, on the ground that a trust has resulted to them from the fraud of the appellees, and is, therefore, within the exception of the act. But the only misconduct charged is that the appellees now refuse to recognize the trust, and that, notwithstanding their promise to be bound by it, they now declare they will not regard it. This is not enough to take the case out of the plain words of the statute. If no valid trust was created in the first instance by William McCloskey, because he did not declare it in writing, there are no trustees to be bound by their promises, nor any cestuis que trustent to be protected. The statutes of frauds would soon become a dead letter if the mere broken promises of a trustee under a trust created by parol, who had agreed to carry it out, should, without more, be held sufficient to create a trust by implication within the exception of the act. It is only when a trustee refuses to perform or recognize a trust that courts are asked to declare its existence as against him, and if a trust, which has no legal existence under the statute, can be brought into being as within the exception simply because a trustee breaks his promise to perform, no case will be without the exception. The statute [225] of frauds would be worse than waste paper, if a breach of the promise created a trust in the promisor, which the contract itself was insufficient to raise"

And now, December 5, 1904, the demurrer is sustained and the bill dismissed at the costs of the plaintiffs.

For Authorities Bearing upon the Decision in the principal case, see the monographic note to McCoy v. McCoy, 102 Am. St. Rep. 236, 237, on what amounts to a contract for the sale of land within the meaning of the statute of frauds.

KELLY v. KEYS.

[213 Pa. St. 295, 62 Atl. 911.]

OIL LEASES—Ejectment.—A grant of an exclusive privilege to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, does not vest in the grantee any estate in the land or oil, but is merely a license, or grant of an incorporeal hereditament, and he cannot maintain ejectment against the grantor or those claiming under him by subsequent grant, if he has never been in actual possession, though, at the time of the action of ejectment, oil is being produced in paying quantities. (p. 548.)

OIL LEASES.—Grants of Exclusive Rights to mine for and produce oil, though it be a mineral, is not a sale of the oil that may afterward be discovered. When oil has been discovered under such a grant, it is the grantee's right to produce it and sever it from the soil. So much as is thus severed belongs to the parties entitled to it under the terms of the grant, not as any part of the real estate, but as a chattel, and only so much as is produced and severed passes under the grant. (p. 549.)

E. Mackey, R. W. Irwin, I. Baum, J. W. Lee, C. D. Scully and R. R. Lee, for the appellants.

S. Amspoker, J. M. Buchanan and A. E. Barnett, for the appellee.

296 STEWART, J. The defendant Keys, being the owner of a certain tract of land in Washington county, by instrument in writing duly executed and acknowledged, granted to Kelly, the plaintiff, the exclusive right to mine and produce therefrom petroleum and natural gas, with possession of so much of the land as might be necessary for such purposes, for a term of two years, subject 297 to certain conditions and stipulations which do not here call for recital. Kelly never exercised any rights under the grant, and never entered into possession of any part of the premises. Subsequently, Keys, claiming that by reason of a default Kelly had forfeited his rights under the grant, conveyed a like right in the premises to C. D. Greenlee and the Southern Oil Company, the other defendants, who proceeded to explore the property and succeeded in producing oil therefrom in paying quantity.

Kelly, averring compliance on his part with all the conditions and stipulations of the grant under which he claimed, and denying a forfeiture, brought this action of ejectment against the defendants to compel surrender of possession to himself. The action resulted in a verdict for the plaintiff,

subject to the decision of the court on a question reserved, viz., whether ejectment in such case would lie. Upon consideration judgment was rendered upon the reserved point in favor of the plaintiff. The assignment of error that relates to the action of the court on this point is the only one that calls for present consideration.

In reaching his conclusion on the point reserved, the learned judge gave full recognition to the binding authority of Funk v. Haldeman, 53 Pa. St. 229, and the cases that follow it, wherein it is held that the grant of exclusive privileges to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, as in this case, does not vest in the grantee any estate in the land or oil, but is merely a license or grant of an incorporeal hereditament.

This court has found frequent occasion to assert its continued adherence to the doctrine of these cases. Only recently, in the case of Hicks v. American Natural Gas Co., 207 Pa. St. 570, 57 Atl. 55, 65 L. R. A. 209, it reasserted it without qualification. Once it was determined that the subject of such a grant was an incorporeal hereditament, and not an estate in the land or oil, it logically and necessarily resulted that it would not support an action in ejectment. And this view has been steadily adhered to. In no case has ejectment been sustained under such a grant, except where possession had been acquired by the grantee, and he had been wrongfully disseised. In the present case disseisin was not, and could not be, asserted. Nor could it be contended [298] that the instrument under which Kelly claimed, though spoken of as a lease, and so denominated in the instrument itself, is in point of fact and law, a lease, notwithstanding it allows possession of so much of the surface of the premises as may be necessary to conduct mining operations. This much will be implied without express stipulation; and the stipulation being expressed in no way distinguishes this from the cases where such an instrument is held to be merely a grant or license. The court below put no other construction on this, so long as it concerned no one but grantor or grantee; but because the defendants holding under a subsequent lease, being in possession, had produced and were producing oil in paying quantity, reached the conclusion that what had been the grant of an incorporeal hereditament, now that the oil had been found and was being produced, was an estate in

the land, since oil was a mineral, and therefore part of the land; and that Kelly being entitled to be put in possession of so much of the estate, ejectment could be brought for such purpose.

This line of argument overlooks the very consideration on which the authorities cited rest. In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil; so much as is thus severed belongs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant; as to all not produced, there is no change of property. It is expressly so ruled in Funk v. Haldeman, 53 Pa. St. 229; and the same ruling was repeated and emphasized in the case next following on the same subject: Dark v. Johnston, 55 Pa. St. 164, 93 Am. Dec. 732. These were the first cases in which grants of rights to explore for oil were considered and passed upon by this court. The rulings therein have been steadily and consistently followed. In this connection it is only necessary to refer to the case of Union Petroleum Co. v. Bliver Petroluem Co., 72 Pa. St. 173, where the grant was the same as in the present case, with the additional fact that there, as here, oil had actually been discovered and was being produced, and Barnhart v. Lockwood, 152 Pa. St. 82, 25 Atl. 237.

299 The reason for the rule thus established is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas and oil, and those which have a fixed situs and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil in situ has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that the mineral once discovered, all that was in situ became in law part of the real estate.

With the rights of the appellee thus defined and limited by the cases cited above, it is manifest, without discussion, that he is in no position to maintain ejectment for the property. The question reserved was to this very point, and was raised

in the first point submitted by the defendant, denying plaintiff's right to ejectment. The latter should have been affirmed. Its refusal is the subject of the eighth assignment of error, which must be sustained. It is unnecessary to consider the other assignments of error.

Judgment reversed, and judgment is directed to be entered on the point reserved in favor of defendant, non obstante veredicto.

An Ordinary Oil Lease, under which the lessee is required to pay no rent other than a share of the oil, and is given an absolute right to surrender it, is inchoate, contingent, and for the purpose of search only, until oil or gas is found. If the lessee gets no oil, he acquires no vested interest; and, on the other hand, if he gets oil, he acquires a vested interest: Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027.

NICOLETTE LUMBER COMPANY v. PEOPLE'S COAL COMPANY.

[213 Pa. St. 379, 62 Atl. 1060.]

CARRIER'S LIEN FOR DEMURRAGE.—A common carrier has no lien, in the absence of express stipulation to that effect, on freight for demurrage for delay by the consignee in unloading at the point of destination, nor has the carrier any right to retain possession of such freight until demurrage is paid. (p. 552.)

W. M. Hall, Jr., for the appellant.

H. A. Davis, for the appellee.

380 BROWN, J. This is an action of replevin brought for the recovery of possession of lumber, which had been transported on barges of the defendant from the mill of the plaintiff in West Virginia to Pittsburg, under a freight contract of two dollars per thousand feet. This charge was paid before the institution of the replevin and is not involved in the case. It seems there was a delay of some days after the lumber reached Pittsburg before the plaintiff or its consignees demanded the barges from the defendant for the purpose of taking them farther up the Allegheny river to the point of delivery designated in the contract. The delay is alleged to have been due to the low state of the water, rendering navigation impossible. Be this as it may, the instructions to the

jury were, that if the plaintiff or its consignees neglected to receive the barges upon their arrival at Pittsburg, after reasonable notice from the defendant to do so, it was entitled to a verdict for demurrage, for the reason that it had a lien on the lumber for such claim. Under these instructions there was a finding for the defendant for five hundred and twenty-five dollars and forty cents. On appeal from the judgment on this verdict the superior court affirmed it, holding that the defendant, as a common carrier, had a claim for demurrage which was a lien on the lumber, by virtue of which it had a right to retain the property until the amount of the lien was paid.

The question on this appeal is not as to the right of the appellees to demand and recover compensation for the detention of its barges, if they were unreasonably detained by the [381] appellant, but is as to its right of lien upon the lumber, entitling it to retain possession of the same until its alleged lien was paid. If it had such a lien, it was entitled to retain possession of the property until the lien was discharged; if it had not, it unlawfully detained the lumber from the plaintiff, even if its barges had been unreasonably detained.

In an action of replevin nothing can be tried but the right of possession of the property in controversy. In this case the lumber admittedly belonged to the plaintiff, which could not be denied the possession of it by the defendant, unless the latter had a superior right of possession. A mere claim for compensation for the prolonged use of its barges could give it no such right, unless the right to such compensation created a lien on the property on the barges—a lien on the lumber for the demurrage.

Even if it be conceded, as held by the superior court, that the appellee was a common carrier, by what rule of the common law, or by what statute, had it any such lien as it asserted and as the superior court recognized? The parties to the contract for carrying the lumber might have provided for it in their contract, and if so, the appellant would be bound by it; but there was no such agreement. That none exists in the absence of it is so well settled that we need do nothing more than call attention to some of the many authorities upon the subject.

When a shipper of goods commits them to a common carrier for shipment to a given point, he does so under a con-

tract that fixed freight charges will be paid. The business of the common carrier is to carry freight, and to carry it for compensation to be paid either at the time of shipment or before the consignee is entitled to receive it. The amount to be paid is as well known to the shipper as to the carrier, and, as it is to be paid before the consignee receives the goods, it is a lien upon them until paid. But in the absence of any provision in the contract for demurrage, caused by the shipper or his consignee, it is not taken into account, for it is not reasonably to be anticipated in any case, either by the shipper or carrier. It is the exception in connection with the business of the common carrier, and, therefore, there is no rule of the common law applicable to it beyond the one that requires the delinquent shipper or consignee to pay for his detention of the cars, not anticipated [382] or provided for in the contract of shipment. This is the liability that attaches to everyone to pay reasonable compensation for the use and occupation of the property of another not used or occupied in pursuance of any contract; but out of such a condition no lien on the personal property on the premises so used and occupied can arise, because, if for no other reason, the amount of the liability is not fixed. For what amount is a common carrier, in any case, to have a lien for demurrage when the amount to be paid for it has not only not been fixed by a contract, but is in dispute and is to be settled by a jury?

If any lien could exist in the present case, it would be a common-law lien, which is "a right in one man to retain that which is in his possession belonging to another, till demands of him, the person in possession, are satisfied. It is founded upon the immemorial recognition of the common law of a right to it in particular cases, or it may result from the established usage of a particular trade": 19 Am. & Eng. Ency. of Law, 2d ed., p. 7. "The lien allowed to the carrier by the law extends only to his charges for the transportation of the goods, and does not include expenses for warehousing them; nor damages for the breach of collateral contracts or covenants by the shipper, even when incorporated in the bill of lading; nor extend to the payment of port charges; nor to damages for detention beyond the time fixed by the contract for receiving, or loading or unloading the goods; nor to compensation for delay in the nature of demurrage": Hutchinson on Carriers, sec. 478. "There is no lien for

demurrage unless it is stipulated for in the contract:" 9 Am. & Eng. Ency. of Law, 2d ed., p. 270. All liens are created by law or by contract of the parties; and when the law gives none, neither party can create one without the consent or agreement of the other. Hence, the consignee of goods shipped by railroad is not bound by rules and regulations of the company providing for a lien for demurrage, though published, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. A common carrier has no lien upon goods for damages arising from the neglect of the consignee to take them away within a reasonable time after notice to him of their arrival: Chicago [383] etc. Ry. Co. v. Jenkins, 103 Ill. 588. The inconvenience or expense occasioned by the detention of cars constitutes a claim in the nature of a demurrage, but the carrier must seek his redress in the ordinary manner for the breach of an implied contract to pay for the use and occupation of the cars. He cannot enforce it by a detention of the goods: Crommelin v. New York etc. R. R. Co., 4 Keys (N. Y.), 90. "The right of a common carrier to a lien extends to charges connected with the expenses of transportation strictly": 2 Redfield on Railways, 6th ed., p. 193. Attention need not be called to more authorities upon this subject. The judgment of the superior court, affirming the judgment of the court below, must be reversed.

Judgment reversed and a venire facias de novo awarded.

A Common Carrier has a right to charge a reasonable sum as demurrage in case of a delay on the part of the consignee of goods in unloading them: Pennsylvania R. R. Co. v. Midvale Steel Co., 201 Pa. St. 624, 88 Am. St. Rep. 836; Kentucky Wagon Mfg. Co. v. Ohio etc. Ry. Co., 98 Ky. 152, 56 Am. St. Rep. 326; Norfolk etc. R. R. Co. v. Adams, 90 Va. 393, 44 Am. St. Rep. 916, and note. As to whether the carrier has a lien for such charges, see the note to Van Etten v. Newton, 30 Am. St. Rep. 641, and the recent case of Southern Ry. Co. v. Lockwood Mfg. Co., 142 Ala. 322, ante, p. 32.

BURGETTSTOWN NATIONAL BANK v. NILL.

[213 Pa. St. 456, 63 Atl. 186.]

BILLS AND NOTES—Waiver of Protest.—If an indorser on a note indorses on it a waiver of protest one year and a half after its maturity, with knowledge that no demand for payment has been made or notice of dishonor given him, he becomes liable on the note. (p. 555.)

BILLS AND NOTES—Waiver of Protest.—A new consideration is not required to support a waiver of protest of a note either before or after its maturity. (p. 558.)

BILLS AND NOTES—Waiver of Protest—Fraud.—If the indorser of a note seeks to avoid the effect of his waiver of protest thereof on the ground of fraudulent representations made to him at the time of the waiver, he must aver in his affidavit of defense that he was induced to sign the waiver by reason of such misrepresentations. (p. 558.)

A. C. Johnston and G. P. Murray, for the appellant.

C. M. Cooke and O. R. Cooke, for the appellee.

458 MESTREZAT, J. Jacob P. Nill, the defendant, became an accommodation indorser on a promissory note, dated July 1, 1902, for five thousand dollars, which was signed by Homer H. Swaney as maker and was payable to Nill's order at the Burgettstown National Bank. The note recited that the maker had deposited therewith as collateral security to the holder, six one thousand dollar bonds of the Pacific Steel Company of the market value of six thousand dollars, with the right, on certain contigencies, in the holder of the note to call for additional security and to sell the security without notice on failure of the maker to pay the note or furnish additional collateral when required. The note was indorsed in blank by Nill, and Swaney had it discounted by the Burgettstown National Bank, 459 the plaintiff, on or about the day it was executed. There is also indorsed on the note the following: "I hereby waive protest or demand of payment. Jacob P. Nill." The note was duly presented for payment at the bank on September 1, 1902, but payment was refused for want of funds. On December 30, 1904, the note not having been paid, the plaintiff sold the six Pacific Steel Company bonds, held as collateral security for its payment, for six dollars and applied the sum as part payment of the costs of sale.

This action was brought January 17, 1905, against Nill to recover the debt and interest due on the note and the

residue of the costs accruing on the sale of the stock as authorized by the note. The defendant filed an affidavit of defense, the material part of which is as follows: "That of the failure of the said Swaney to pay said note affiant had no notice until some time about March or April, 1904, when a man unknown to affiant, but who represented himself as A. H. Kerr, cashier of the plaintiff bank in this case, came to affiant's place of business in the city of McKeesport and induced affiant to waive protest or demand of payment of said note, by a writing on the back thereof, the said person so representing himself declaring to affiant that the note in the form in which it then was, not having been protested and no notice of dishonor having been given to affiant or demand made upon affiant for the payment thereof, was objected to by the bank examiner, and that the plaintiff relied upon the maker thereof and the collateral security held by them for payment thereof; that for such waiver of protest or demand of payment signed by affiant there was no consideration given, and that any forbearance on the part of plaintiff to Homer H. Swaney, maker of said note, was not given at the request of affiant, but without affiant's knowledge, as affiant believed the note on which suit is brought in this case was paid, until informed to the contrary by the person aforesaid, who represented himself as A. H. Kerr, as aforesaid."

The plaintiff took a rule for judgment for want of a sufficient affidavit of defense which the court made absolute and judgment was entered against the defendant. He has taken this appeal and, as stated in his printed brief, "the sole question is, Did the waiver of protest made eighteen months after [460] the maturity of the note, and under the circumstances sworn to by the appellant relate back to the date of the maturity of the note and bind him as indorser as though he had received due notice of dishonor?"

We think this question must be answered in the affirmative, and that, therefore, there was no error in making the rule absolute and entering judgment against the defendant. There is a clear admission in the affidavit that the defendant knew the laches of the plaintiff before he signed the waiver of protest. The plaintiff's cashier called on the defendant in March or April, 1904, and secured his signature to the writing on the back of the note waiving protest. Until that time, the defendant says he had no notice that Swaney, the

maker, had not paid the note. He was then told, as averred in the affidavit, "that the note in the form in which it then was, not having been protested and no notice of dishonor having been given to affiant or demand made upon affiant for the payment thereof was objected to by the bank examiner." The defendant therefore knew before he signed the waiver of protest that no demand for payment had been made and that no notice of the dishonor of the note had been given him as the indorser. Hence he had full knowledge of the laches of the holder of the note when he waived protest of the instrument. Under these facts, which are disclosed by the affidavit of defense, the defendant could waive the laches of the holder in making demand for payment and in giving notice of the dishonor of the note: 4 Am. & Eng. Ency. of Law, 2d ed., 453; Day v. Ridgway, 17 Pa. St. 303; Annville Nat. Bank v. Kittering, 106 Pa. St. 531, 51 Am. Rep. 536. "An indorser is entitled to notice of protest of a negotiable note," says Mr. Justice Coulter, in delivering the opinion in Day v. Ridgway, "because the contract is that the maker will pay at maturity; and the strict punctuality, which is the life of the commercial law, authorizes the indorser to presume that he has paid, in the absence of any notice to the contrary. But the right to receive notice in order to make him liable, like any other right, may be waived by the indorser." In the Kettering case, Sterrett, J., delivering the opinion, says (page 533): "No principle of the law-merchant is better settled than that demand and notice of the nonpayment of a negotiable note may be waived by the indorser, either orally or in writing, or [461] by acts clearly calculated to mislead the holder and prevent him from treating the note as he otherwise would, but there is some diversity of opinion as to what constitutes a waiver of these necessary prerequisites to charge the indorser."

The indorser may waive protest after the date of maturity of the note with like effect as if done prior to that date: Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661; Hoadley v. Bliss, 9 Ga. 303; Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669; Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1; Rindge v. Kimball, 124 Mass. 209; 1 Parsons on Notes and Bills, 594; 2 Randolph on Commercial Paper, sec. 1456. In Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661, this court said (page 401): "It seems, therefore, that the duty of de-

mand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time in accordance with the maxim, 'Quilibet potest renunciare juri pro se introducto.' " In some jurisdictions it is held that the waiver when made after the maturity of the note must be with full knowledge of the indorser's laches and that it requires a new consideration. But it is settled by numerous American authorities that a waiver of protest need not be supported by a new consideration: Neal v. Wood, 23 Ind. 523; Hughes v. Bowen, 15 Iowa, 446; Creshire v. Taylor, 29 Iowa, 492; Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669; Tebbetts v. Dowd, 23 Wend. 379; Wall v. Bry, 1 La. Ann. 312; Lane v. Steward, 20 Me. 98. We know of no decision of this court holding that such waiver must be supported by a new consideration. The contrary rule, however, is distinctly recognized in Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661. In that case Mr. Justice Lowrie, in construing the contract of an indorser of negotiable paper, says (page 400): "The most, therefore, that can be said of an indorsement of negotiable paper is, that from it there is implied a contract to pay, on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally or in writing. But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it. If it is part of the contract, how can it be effectually dispensed with without a new contract for a sufficient consideration, especially after the maturity of the note? Yet there are [462] decisions without number that a waiver of it during the currency, or after the maturity of the note, will save from the consequences of its omission. This could not be if it was a condition of the contract, for then the omission of it would discharge the indorser both morally and legally; and no new promise afterward, even with full knowledge of the facts, could be of any validity. If, however, an indorsement without other circumstances be regarded as an implied contract to pay, provided the holder use such diligence that the indorser loses nothing by his negligence or indulgence, then it accords with all these decisions. Then the law, and not the contract, declares the usual demand and notice to be in all cases conclusive, and in some cases necessary evidence

of such diligence. It [the law], therefore, is perfectly consistent in declaring that an indorser is bound by a new promise, after he knows of the omission of demand and notice, for this is an admission that he was not entitled to it, or has not suffered for want of it. It declares demand and notice necessary, in some cases, to save the indorser from loss and it declares that his own admission may be submitted for them." It is manifest, therefore, that, from the nature of the indorser's contract, a new consideration is not required to support a waiver of protest before or after maturity of the paper.

There is no merit in the suggestion of appellant that the waiver of protest was induced or secured by the representation of the plaintiff's cashier that the bank relied for payment of the note upon the maker and the collateral security held by it. If the defendant intended to make such an averment in his affidavit, he signally failed. A declaration to that effect, the affidavit avers, was made, but the affidavit does not state that it induced the defendant to sign the waiver of protest. If the defendant desired to invalidate his waiver of protest on the ground that it was procured by fraud, he was required to aver the fact clearly and explicitly in his affidavit of defense and not leave it to be inferred by the statements in the affidavit. What is not directly and explicitly averred in an affidavit of defense will be taken as not existing and, hence, as insufficient to prevent judgment.

The assignments of error are overruled and the judgment of the court below is affirmed.

An Indorser's Promise to Pay a note made after the failure to notify him of presentment and dishonor is binding on him if he knew that no notice had been given, though he did not know the legal effect of such omission: Glidden v. Chamberlain, 167 Mass. 486, 57 Am. St. Rep. 479. And where an indorser indorses a waiver of protest and notice thereof on a note, and promises to pay, he is charged with knowledge of all that the paper contained at the time: Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832. Protest of a note may be verbally waived: Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559. The words "no protest" written across the face of a bill of exchange is a waiver of protest: Citizens' Bank v. Millet, 103 Ky. 1, 82 Am. St. Rep. 546.

MARGO v. PENNSYLVANIA RAILROAD COMPANY.

[213 Pa. St. 468, 62 Atl. 1081.]

EXECUTIONS—Exempt Property of Railroads.—The property of a railroad company necessary to enable it to perform its duties to the public is not subject to seizure and sale under execution. (p. 560.)

EXECUTIONS—Exempt Railroad Property.—Railroad property essential and necessary to its existence and in actual use cannot be seized and sold under an ordinary writ of execution. (p. 560.)

EXECUTIONS — Railroads — Exempt Property. — Materials owned by a railroad company and used by it for the repair of its bridges, tracks, sidings, and other like emergency purposes cannot be levied on and sold under an ordinary execution. (p. 561.)

H. W. Story, for the appellant.

P. J. Little, for the appellee.

469 ELKIN, J. The plaintiff recovered a verdict in the court below in an action of trespass for injuries resulting in the death of her husband. On February 10, 1905, after a new trial had been refused, judgment was entered on the verdict. On March 4th, a fieri facias was issued thereon returnable the first Monday of June following. A levy was then made on some personal property in the office of the superintendent of the defendant company. On March 13th, the defendant took an appeal to the supreme court. On the following day the levy was stricken off by order of the court. On May 22d, another levy was made on the personal property in and around the superintendent's office. On the same day a levy was also made on seven separate parcels of land, which were formerly a part of the right of way of the old portage road, and notice was served on defendant that inquisition proceedings would be held thereon June 5th. The defendant then presented a petition asking that the sale of the personal property be set aside on the ground that the writ was invalid. On the return day of the writ, the sheriff made another levy on the railroad ties, rails, lumber and other materials used by the defendant company for emergency purposes, and advertised the same to be sold on June 22d. On June 14th, defendant presented a petition asking that the levy on the personal property and the inquisition proceedings on real estate be set aside. A rule to show cause was granted returnable June 19th, at which

time testimony was taken and the court discharged the rule. Thereupon the sheriff again advertised the sale of the personal property to take place July 6th. On July 3d, on petition to the supreme court, a rule to show cause why the appeal when taken should not be a supersedeas was granted, and an order was made staying the proposed sale and all other proceedings, the rule being made returnable to the western district October 14th, 1905. On July 5th, this appeal was taken from the orders of the court below as above indicated.

A little forbearance and professional courtesy, which should always be shown by members of the bar to each other, would have saved this vexed and complicated record. The fieri facias was issued a few days before the appeal was taken, without notice to the defendant or its counsel, and a levy was made on certain personal property, but on the day following the appeal [470] this levy was stricken off by the court. Notwithstanding that the appeal was pending, counsel for plaintiff caused the sheriff to make a new levy and proceed to a sale thereon for the purpose of satisfying the judgment appealed from. It is contended that his right to thus proceed is justified by the act of May 19, 1897 (Pub. Laws, 67), relating to appeals to the supreme and superior courts, wherein it is provided that an appeal shall not be a supersedeas to an execution issued on a judgment unless taken and perfected within three weeks from the entry of the judgment. More than three weeks elapsed from the entry of the judgment until the appeal was taken. Counsel for defendant within a few days from the time he had notice of the entry of the judgment took an appeal and proceeded at once to perfect it. He has been diligent in resisting the claims of the plaintiff at every stage of the proceedings since that time. This record discloses a somewhat anomalous situation. The plaintiff has caused a fieri facias to be issued, levy to be made, and the sheriff has actually sold personal property belonging to the defendant in partial satisfaction of the judgment entered in the court below, while the validity of that judgment was still pending in the supreme court. This court at No. 65, October term, 1905, reversed the judgment, and as the record now stands, there is no judgment to support an execution. It would have been wiser for the learned counsel for appellee to have waited the final determination of the questions involved on the appeal.

Another question has been raised by this appeal, which it is necessary to consider. The levy of June 5th, was made on railroad ties, rails, lumber, water pipe, iron pipe and other personal property which the defendant alleges is used for emergency purposes. It is contended that this property is exempt from levy and sale under the ordinary writ of fi. fa. On grounds of public policy the law does not permit the seizure and sale on execution of the property of a railroad company necessary to enable it to perform its duties to the public. This is the settled rule of our cases: Foster v. Fowler, 60 Pa. St. 27; Youngman v. Elmira etc. R. R. Co., 65 Pa. St. 278; Mausel v. Railway Co., 171 Pa. St. 606, 33 Atl. 377; Bell v. Wood, 181 Pa. St. 175, 37 Atl. 201.

In a number of cases it has been held that property essential and necessary to the existence of a railroad company and in actual [471] use cannot be seized and sold under an ordinary writ of fieri facias. In such cases the special writ provided by the act of April 7, 1870 (Pub. Laws, 58), is the proper remedy. It has also been held that property, real or personal, necessary to the exercise of a public franchise, is to be regarded as part thereof, and is not subject to execution by the ordinary writ: Bank v. Columbus Tanning Co., 170 Pa. St. 1, 32 Atl. 539.

The testimony taken on the rule in the court below clearly shows that the materials levied on were all intended to be used for emergency purposes; that it was necessary to keep in stock a large amount of these materials in order to insure the proper maintenance and operation of the railroad; and that the materials on hand were not more than were necessary for these purposes. No evidence was offered in contradiction of the testimony of the witnesses produced by the defendant. The testimony stands unimpeached. It clearly established the fact that the materials levied upon were used for repairs of bridges, tracks, sidings, and other like emergency purposes, wherein the very highest standard of care is required in the discharge of the defendant's duties to the public.

The learned court was in error in disregarding the testimony offered and drawing its own conclusions that the materials levied on did not hinder the defendant in the performance of those acts authorized under its charter.

The order of the court of July 19, 1905, discharging the rule to show cause why the levy and inquisition should not be set aside, is reversed, and it is ordered that a writ of restitution be issued by the court below for the property sold.

The Question of Whether the Property of a Railway Company necessary to the operation of its road is exempt from attachment or execution is discussed in Wall v. Norfolk etc. R. R. Co., 52 W. Va. 485, 94 Am. St. Rep. 948. This question is further considered with reference to the cars of an interstate railway in Connery v. Quincy etc. R. R. Co., 92 Minn. 20, 104 Am. St. Rep. 659.

CASES

IN THE

SUPREME COURT

OF

SOUTH CAROLINA.

TRAYWICK v. SOUTHERN RAILWAY COMPANY.

[71 S. C. 82, 50 S. E. 549.]

CARRIERS—Delay in Delivery.—Damages for loss in failing to mill rice carried by a number of persons to other mills cannot be recovered against a common carrier for delay in delivering a rice huller, if he has no notice of the use to which the huller is to be put by the purchaser and consignee. (p. 566.)

DAMAGES—Notice of Purpose for Which Property is Purchased.—The fact that a rice huller is shipped to a firm at a point other than its usual place of business is not one which the carrier must consider for the purpose of determining whether the purchaser, who is the transferee of the bill of lading, had bought such huller with the object of making a profit by hulling rice. (pp. 566, 567.)

B. L. Abney and J. W. Barnwell, for the appellant.

J. F. Izlar, for the respondent.

[82] GARY, J. The questions presented by the exceptions require reference to the complaint, which is as follows:

The first paragraph of the complaint alleges the corporate existence of the defendant.

[83] "II. That on or about the 16th day of October, 1899, the plaintiff ordered through W. H. Gibbes & Co., of Columbia, S. C., one rice huller, to be shipped to him at Cope, S. C., as early as practicable; that shortly thereafter plaintiff received through the said W. H. Gibbes & Co., the bill of lading for said rice huller, duly indorsed to him, showing that on the said 16th day of October, 1899, the Barnard & Leas Manufacturing Co., of Moline, in the State of Illinois, had delivered to the Chicago, Burlington and Quincy Railroad Co. one rice huller, knocked down and crated, two pieces, weight 1,100 pounds, consigned to W. H. Gibbes & Co., Cope, S. C.; and that the said rice huller had been

shipped as second class freight, at the rate of one dollar and forty-two cents per hundred.

"III. That the said bill of lading provided among other things as follows: 'If destination is not on the line of the Chicago, Burlington and Quincy Railroad Co., delivery to be made at any convenient station on the line of the Chicago, Burlington and Quincy Railroad Co. to a connecting carrier; whereupon all further liability of the Chicago, Burlington and Quincy Railroad Co. shall cease'; that the said Chicago, Burlington and Quincy Railroad Co., in pursuance of its said agreement, and for the consideration therein named, did within a reasonable time after the receipt of the said rice huller, as aforesaid, transport and deliver the said rice huller to the connecting carrier at the most convenient station on its line, the point of destination, Cope, S. C., not being a station on its said line; and that thereafter, and within a reasonable time, the said rice huller, the property of the plaintiff, of the value of $275, was delivered to and received by the defendant herein, to be transported and delivered by the defendant at some convenient station on its line to the connecting carrier, to be transported to the point of destination, Cope, S. C., a station not on defendant's line.

"IV. That notwithstanding the said rice huller was, as plaintiff is informed and believes, delivered to and received [84] by the defendant in good order from its connecting carrier, and within reasonable time, after its shipment from Moline, in the state of Illinois, the defendant failed to care for or safely to carry said rice huller; but so negligently and carelessly carried the same, that the said rice huller became broken, thereby unfit for use, until the broken parts could be supplied from the manufactory at Moline, aforesaid; and that after the said rice huller had been carried by the defendant to the city of Columbia, in the state of South Carolina, a station on the defendant's line, it was unloaded and placed in its depot at said point, and was there, through the negligence and carelessness of the defendant and its servants, permitted to remain the space of thirty days, and was not carried forward until the same was traced up by the said W. H. Gibbes & Co., and ordered to be carried forward by the defendant, as it had undertaken and agreed to do.

"V. That the said rice huller did not, by reason of the negligence and carelessness of the defendant, arrive at Cope, S. C., the point of its destination, until the 11th day

of November, 1899, more than thirty days after it was delivered to and received by the defendant company, to be carried forward by the defendant company with care and safety, and without delay, to the point of its destination; and more than sixty days after it was shipped from Moline, in the state of Illinois.

"VI. That the plaintiff was at the times above mentioned, and is now, engaged in the rice milling business, and the delay caused by the defendant in forwarding said rice huller, and in having the injuries thereto repaired, deprived him of its use during nearly all the rice milling season, and caused a number of persons who had engaged the plaintiff to hull their rice to take it elsewhere, whereby he lost all the profits which would have otherwise accrued to him from his said business, which would have amounted to a large and considerable sum."

The seventh paragraph alleges the damages at one thousand dollars.

[85] The defendant made a motion at a previous term of the court to strike out the words, "and caused a number of persons who had engaged the plaintiff to hull their rice to take it elsewhere," in paragraph 6 of the complaint, which was refused.

The jury rendered a verdict in favor of the plaintiff for one hundred and fifty dollars.

The defendant appealed upon numerous exceptions.

The first question for consideration is, whether his honor, the presiding judge, erred in allowing the plaintiff to introduce testimony, showing loss of profits, by reason of the fact that the public carried their rice elsewhere to be hulled, on account of the delay mentioned in the complaint.

The general principles relating to the recovery of damages may be said to have been definitely settled since the leading case of Hadley v. Baxendale, 9 Ex. 341. The difficulty arises when it becomes necessary to apply the general principles to the facts of the particular case. The principles indicated in the case of Hadley v. Baxendale are thus succinctly stated in section 14 of Wood's Mayne on Damages: "1. That damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things are always recoverable. 2. That damages which would not arise in the usual course of things from a breach of contract, but which do

arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract." This language is quoted with approval in Sitton v. McDonald, 25 S. C. 68, 60 Am. Rep. 484.

[86] The case of Mood v. Western Union Tel. Co., 40 S. C. 524, 19 S. E. 67, shows that special damages are not recoverable unless expressly alleged, and that those damages are special that do not necessarily result from the wrongful act. In the case of Hays v. Western Union Tel. Co., 70 S. C. 16, 106 Am. St. Rep. 731, 48 S. E. 608, 67 L. R. A. 481, it was decided that profits were recoverable, when they "may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." In speaking of the notice disclosed by the telegram in that case, the court uses this language: "In the case now under consideration, the telegram which defendant undertook to transmit indicated on its face the purpose to give information of the price of livestock by size, for the word 'hand,' as the term of measurement, is not usually applied otherwise. Such a message also gives notice that it will be used as a basis of business action or nonaction, and that loss or profit is liable to result. Indeed, the sole purpose of such telegrams is obviously to make profit by purchase and sale, and this purpose was within the understanding of the plaintiffs and the telegraph company when it undertook to deliver the message."

We proceed to apply these principles to the facts of the case under consideration. A rice huller may be purchased for various purposes. For instance, it might be bought for private use, or for sale, or for making profit by hulling rice for the public. The case of Hays v. Western Union Tel. Co., 70 S. C. 16, 106 Am. Rep. 731, 48 S. E. 608, 67 L. R. A. 481, decided that when the object is to make profit, the party committing the act of wrong must, in some manner, have notice of this fact. This testimony, under the pleadings, was, therefore, inadmissible and the presiding judge erred in allowing it to be introduced.

We will consider whether his honor, the presiding judge, erred in ruling that there was evidence of notice on the part

of the defendant. His ruling was based upon the fact that [87] the huller was shipped to W. H. Gibbes & Co., with a bill of lading at Copes, instead of Columbia, South Carolina, the usual place of business of said firm. His view was that the defendant was bound to consider this fact in determining the purpose for which the huller was to be used by the plaintiff, as the real party in interest, and the transferee of the bill of lading. We do think this testimony tended to show that the plaintiff purchased the huller for the purpose of making profit by hulling for the public. This ruling was likewise erroneous.

The last question is whether there was error in refusing to strike out the words, "and caused a number of persons who had engaged the plaintiff to hull their rice to take it elsewhere," in paragraph 6 of the complaint. The object in alleging that fact was to enable the plaintiff to prove special damages. The plaintiff failed to allege notice of this fact on the part of the defendant. Therefore the allegation should have been struck out, as the plaintiff could deprive no benefit from it, without the further allegation of notice on the part of the defendant.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded to that court for a new trial.

For Authorities discussing the question involved in the principal case, see Savannah R. R. Co. v. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92; Rocky Mount Mills v. Wilmington etc. R. R. Co., 119 N. C. 693, 56 Am. St. Rep. 682; Swift River Co. v. Fitchburg R. R. Co., 169 Mass. 326, 61 Am. St. Rep. 288; Railroad v. Cabinet Co., 104 Tenn. 568, 78 Am. St. Rep. 933; McKinnon v. McEwan, 48 Mich. 106, 42 Am. Rep. 458, and note.

ADGER v. BLUE RIDGE RAILWAY COMPANY.

[71 S. C. 213, 50 S. E. 783.]

CARRIERS—Baggage.—The price of a passenger ticket includes compensation for the carriage of such baggage as may be necessary for the personal convenience of the passenger. (pp. 570, 571.)

CARRIERS—Loss of Baggage.—If a person applies for a passenger ticket and transportation of baggage over the line of an initial carrier and its connecting lines, and notifies the carrier at the time that he does not intend to become a passenger over the initial line, whereupon the carrier refuses to sell him a through ticket, but does sell him a ticket over its own lines, and receives and checks the baggage through to its destination over its own and connecting lines, it is liable for the value of such baggage in case it is lost. (p. 571.)

T. P. Cothran, for the appellant.

Smythe, Lee & Frost and Tribble & Prince, for the respondent.

222 GARY, J. The allegations of the complaint material to the questions presented by the exceptions are as follows: "That on the third day of September, A. D. 1903, the plaintiff delivered to the defendant, through its proper and lawful agents, in the town of Walhalla, state of South Carolina, one trunk in good shipping order, to be transported for valuable consideration, then and there paid, either over its own or over connecting railway lines, from the town of Walhalla to the city of Charleston, state aforesaid. That the defendant accepted the same to be so transported, and as a receipt therefor gave to the plaintiff a check of the said railway company designated by the number 6555. That the defendant, not regarding its duty, did not use proper care therein, but by the willful misconduct and gross negligence of it and its servants said trunk with its contents has been wholly lost."

The answer denies these allegations, and sets up as a defense "that the plaintiff never became a passenger upon defendant's line, the relation of passenger and carrier never existed, and the obligation of a carrier was not assumed by the defendant."

The jury rendered a verdict in favor of the plaintiff for twelve hundred and seventy-six dollars and sixty cents. The defendant appealed upon exceptions which will be set out in the report of the case.

The uncontroverted facts are, that on the 3d of September, 1903, the plaintiff and her husband, John B. Adger, came by private conveyance from the highlands of North Carolina to Walhalla, South Carolina, for the purpose of returning on the railroad trains to Charleston, South Carolina. When they arrived at the depot at Walhalla they found the three trunks on the platform at the station. They requested the defendant's agent to sell them tickets to Charleston and check their baggage to that place, stating that they wanted to go by way of Spartanburg, so as to be able to take a sleeper to Charleston, and also stating to him that in order to take that route, it would be necessary for them to go by private conveyance [223] to Seneca, as they wanted to leave their horse and buggy with a friend. The agent told them that he could not sell them tickets to Charleston, but could sell them tickets to Spartanburg, and would check their baggage through to Charleston. The baggage was put on the train and was seen at Seneca and other points on defendant's road, but one of the trunks failed to reach its destination. They purchased the tickets to Spartanburg with the bona fide intention of getting aboard the train as passengers from Seneca to Spartanburg, and for the purpose of enabling them to have their baggage checked to Charleston. It was their desire and intention that they and their baggage would arrive in Charleston at the same time.

In the early history of railroads it was held that, as a carrier was only liable for the negligence causing injury to a passenger, it was only liable to that extent for loss of his baggage. The courts have repudiated this doctrine, and a railroad is now held to the strict liability of a carrier of goods. In the early development of railroads, it was likewise regarded as necessary for the passenger to accompany his baggage for the purpose of identifying it and receiving it when it reached its destination. This is still necessary in England and other countries, where the system of checking does not prevail. But now, carriers in this country frequently refuse to take baggage on trains which carry passengers, and give notice of this fact in their timetables. The carrier has absolute control over the baggage after checking it, until it reaches its destination, and may select the particular train upon which it is to be carried. The fact that a person purchasing a ticket does not ride on

the train does not in itself place the carrier at any disadvantage. The only reasons now existing why a person purchasing a ticket without the intention of taking passage should not be regarded as a passenger are that this relation imposes a liability upon the carrier that would not otherwise exist; and, furthermore, the conduct of the carrier's business might [224] possibly be interfered with, as baggage must necessarily be transported more rapidly than freight.

When a person purchases a ticket there is an implied agreement that he intends to become an actual and not a constructive passenger, and he has no right to change the contract without the assent of the carrier. Good faith is involved in the purchase of the ticket. When, however, it would be inequitable for the carrier to insist upon this implied agreement, it is estopped.

After these general remarks, we proceed to construe the contract in this case and to determine the relation thereby created between the plaintiff and the defendant. When the trunks were tendered for transportation, the law imposed upon the defendant as a common carrier the duty of carrying them, either as baggage or as freight, upon satisfactory arrangements being made as to compensation: Mathis v. Southern Ry. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

Instead of insisting upon the right to carry the trunks as freight, the defendant recognized and assented to the right of the plaintiff to have them checked as baggage, and thereby elected to assume the liability incident to the transportation of baggage. Was there any consideration for the checks? There are no facts from which it can reasonably be inferred that either the plaintiff or the defendant contemplated the carriage of the trunks by the defendant as a gratuitous bailee; on the contrary, the only reasonable inference is they intended that the price for the ticket should include the consideration for the checks. If the defendant intended to assume the relation of gratuitous bailee, it was its duty to give notice of this fact, when it knew the plaintiff relied upon the price of the tickets as the consideration for the checks.

The principle is well settled that the price of a ticket includes compensation for the carriage of such baggage as may be necessary for the personal convenience of the passenger. The plaintiff by the acquiescence of the defendant

225 was to all intents and purposes a passenger, in so far as baggage was concerned. In the case of Marshall v. Pontiac etc. R. Co., 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650, the court held that one who purchases a railroad ticket for the sole purpose of checking his baggage upon it, with the intention of going to his destination in his private conveyance, can hold the carrier liable only as a gratuitous bailee of the baggage, and cannot recover in case it is stolen from the baggage-room, unless the carrier is guilty of gross negligence. There is an exhaustive and vigorous assault upon the doctrine of that case in a note to it in 55 L. R. A. 650. The facts of this case are, however, quite different. There was good faith on the part of the plaintiff, and all the facts were made known to the agent. Furthermore, the ticket was not bought solely for the purpose of checking the baggage, as the plaintiff intended to get on board the train at Seneca and ride to Spartanburg en route to Charleston.

This disposes of all the exceptions except the second and seventh.

It is only necessary to refer to section 3, article 9, of the constitution, and to the admission in the answer that the defendant is a common carrier, to show that the second exception cannot be sustained.

The charge mentioned in the seventh exception was favorable to the defendant. It, therefore, has no ground of complaint.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The Liability of a Carrier for Baggage where the passenger does not accompany it is discussed in the monographic note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 384. The liability for baggage as between connecting carriers is discussed in the monographic notes to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 359; Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 612.

JOHNSON v. SOUTHERN RAILWAY.

[71 S. C. 241, 50 S. E. 775.]

EMINENT DOMAIN—Damages.—In all cases where property is taken in an exercise of the right of eminent domain, except where the right to compensation is disputed, or where the owner has not actively or constructively permitted the entry for construction purposes, the remedy afforded by the condemnation statute is exclusive. (pp. 573, 574.)

EMINENT DOMAIN—Damages—Smoke and Noise.—If a railway company enters land by permission, or without dispute as to the right of the land owner to compensation, and erects an embankment with due care, but so near a dwelling-house that trains operated with due care fill such house with noise, smoke, and cinders, the land owner cannot recover damages therefor in a separate action, as his damages are included in the compensation given by the condemnation proceedings. (p. 574.)

EMINENT DOMAIN—Damages—Surface Water.—If surface water is thrown back on land by a railroad embankment constructed with due care, the resulting damages are included in the compensation received in the condemnation proceedings. (p. 575.)

SURFACE WATER.—Every landed proprietor has the right to take any measures necessary to the protection of his property from surface water, even if in so doing he throws it back upon a coterminous proprietor. (p. 575.)

Davis & Best, R. C. Holman and H. F. Buist, for the appellant.

B. L. Abney, J. W. Barnwell and R. Aldrich, for the respondent.

242 JONES, J. The plaintiff appeals from an order of nonsuit. After alleging the corporate existence of the defendant railway company and that plaintiff is owner of the premises described, the complaint further alleges:

"(3) That on or about the day of December, 1900, the defendant, with force and arms, entered upon the aforesaid lands of the plaintiff, dug up the soil and constructed a side railroad track thereon, connecting its two lines, that is to say, the South Carolina and Georgia with its (defendant's) main line. And the plaintiff further charges that having converted the said lands to its own use, proceeded to and did build a high embankment in front of the plaintiff's residence on said land within five or six feet of his front yard and near his front gate, completely obstructing the road to and from plaintiff's premises, as aforesaid.

"(4) That the said embankment has caused the surface water to collect and flow back upon the plaintiff's front yard in large quantities in a concentrated form, so much so that in rainy seasons it renders plaintiff's front yard almost impassable, and the other lands of plaintiff's surrounding his dwelling absorb the water to such an extent as to render it almost valueless; and the plaintiff further charges that the said track built upon said embankment is used as a 'Y' for the purpose of reversing engines upon and transferring trains from its lines of road, and in doing so the defendant's engines and cars are stopped in front of plaintiff's residence, and, together in passing to and fro, the plaintiff and his family are subjected to the continual noise of the train, day and night, to the smoke and cinders from the locomotives to [243] such an extent that his residence is rendered almost uninhabitable, and his aforesaid valuable property rendered almost valueless.

"(5) That the acts of the defendant herein complained of were and are willful and wanton, and the plaintiff has already been damaged in the sum of $1,999.99."

The circuit court, in granting the nonsuit, held that if the complaint be treated as one for damages incident to the construction of said railroad embankment, plaintiff's remedy was under the condemnation statute; that if the complaint be treated as an action for negligent construction of said embankment and operation of said railroad, no negligence was either alleged or proved; that with respect to the claim for damages from surface water alleged to have been caused to flow over plaintiff's land by reason of said embankment, there was no evidence to take the case out of the ordinary rule as to surface water and bring it within the rule announced in Brandenburg v. Zeigler, 62 S. C. 18, 89 Am. St. Rep. 887, 39 S. E. 790, 55 L. R. A. 414, and Cain v. South Bound R. R. Co., 62 S. C. 25, 39 S. E. 792.

We think the nonsuit was properly granted. The condemnation statutes allow an assessment not only for the quantity and value of the land which may be required by the railroad company, but for any special damage which the owner may sustain by reason of its construction: Code 1902, sec. 2190. This would certainly include the damages resulting from the construction of the embankment in a proper manner. In all cases, except where the right to compensation is disputed, or where the owner has not actively or con-

structively permitted the entry for construction, the remedy afforded by the condemnation statute is exclusive: Glover v. Remly, 62 S. C. 52, 39 S. E. 780. There was no evidence to show that the right to compensation was ever disputed or that the entry was without the permission of plaintiff. The appellant contends, however, that the action was not to recover compensation for the value of the [244] land, but for the negligent construction of the embankment so as to obstruct ingress to and egress from the premises, so as also to collect surface water and cast it upon the plaintiff's land; and also for the negligent operation of the train, subjecting plaintiff to noise, smoke and cinders. But the complaint does not attempt to allege a case falling within the rules stated in Wallace v. Columbia etc. R. R. Co., 34 S. C. 62, 12 S. E. 815, which allows an action at common law for damages arising from a negligent or unskillful manner in which the railroad is constructed. Where a railroad company, under the statute, has a right to construct its railroad, and has entered with the express or implied permission of the owner, it is not liable as a trespasser to adjacent land owners, under the common law, for the act and result of construction with due care, since the law will not declare that to be a nuisance or trespass which it has authorized. But as the law does not authorize negligence and the condemnation statutes provide no damages for negligence, there is a remedy at common law for damages resulting from a construction done in a negligent manner. The complaint, however, does not allege a negligent construction, but is manifestly based upon an alleged right to recover for damages resulting from the mere construction of the embankment. There was not only no evidence of negligence in the manner of such construction, but, on the contrary, the plaintiff's own testimony, at folio 67 of the brief, shows that the construction was "nicely and properly" done. It is true that there was evidence that the embankment, as located, affected injuriously plaintiff's right of ingress and egress, but there was no evidence that the embankment could have been more carefully located and constructed, and there is no doubt that compensation for such damage to right of ingress and egress could have been secured under the condemnation statute. Nor do we find in the evidence anything tending to show that the inconvenience resulting to plaintiff from the noise, smoke and cinders, incident to the operation of

the [245] cars over the track, was the result of any negligence or wantonness on the part of defendant.

With reference to the matter of surface water, there was no evidence that the defendant did anything beyond constructing the embankment for its track in a proper manner. The evidence was to the effect that by reason of the slope in the land's surface, the natural drainage of the surface water was over plaintiff's land, and that such drainage had previously been prevented only by the construction by the town council of a small ditch which carried the water into Windy Hill Branch, and that said embankment filled said ditch. If any special damage resulted to plaintiff by reason of the construction of the embankment in a proper manner, as already stated, the condemnation statute affords a remedy. There was certainly nothing in the evidence to take the case out of the rule as to surface water announced in Edwards v. Charlotte etc. R. R. Co., 39 S. C. 472, 39 Am. St. Rep. 746, 18 S. E. 58, 22 L. R. A. 246, wherein it was declared that every landed proprietor has the right to take any measures necessary to the protection of his property from surface water, even if in doing so he throws it back upon a coterminous proprietor, and there was nothing in the evidence to make a case within the rule declared in Brandenburg v. Zeigler, 62 S. C. 18, 89 Am. St. Rep. 887, 39 S. E. 790, 55 L. R. A. 414, and Cain v. South Bound R. R. Co., 62 S. C. 25, 39 S. E. 792, wherein it was held that one cannot collect surface water into an artificial channel and cast it upon another's land in concentrated flow.

We have not deemed it necessary to refer to the evidence as to the leakage of water from the defendant's water-tank, as the complaint makes no reference thereto, and the action is based solely upon the result of the construction of the embankment.

The judgment of the circuit court is affirmed.

Mr. Justice Gary did not sit in this case by reason of illness.

The Liability of a Railroad Company where it constructs embankments which interfere with the flow of surface waters to the injury of neighboring property owners is discussed in the monographic note to Mizell v. McGowan, 85 Am. St. Rep. 718; and in the cases of Shahan v. Alabama etc. R. R. Co., 115 Ala. 181, 67 Am. St. Rep. 20; Missouri Pac. Ry. Co. v. Keyes, 55 Kan. 205, 49 Am. St. Rep. 249; Edwards v. Charlotte etc. R. R. Co., 39 S. C. 472, 39 Am. St. Rep. 746. And the liability of a railroad company where it casts smoke and

cinders on private premises is discussed in the monographic note to Smith v. St. Paul etc. Ry. Co., 39 Wash. 355, 109 Am. St. Rep. 889; and in Ball v. Maysville etc. R. R. Co., 102 Ky. 486, 80 Am. St. Rep. 362; Gans etc. Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 35 Am. St. Rep. 706.

McDONALD v. SOUTHERN RAILWAY.

[71 S. C. 352, 51 S. E. 138.]

NEGLIGENCE—Death by Wrongful Act—Action by Mother of Bastard Child.—If a parent is given a right of action for the death of a child caused by wrongful act, the mother, as such parent, cannot recover for the death of her illegitimate child, caused by the negligence of another. (p. 578.)

L. D. Jennings, for the appellant.

E. M. Thompson and C. L. Cuttino, for the respondent.

352 POPE, C. J. This was an action under what is known as Lord Campbell act for damages in the sum of nineteen hundred and ninety-five dollars for the unlawful killing, by the defendant, as a 353 railway, of one Benjamin Pierson, alias Benjamin Lawson, while lying asleep on the railroad track of the defendant. The lad was about twelve years of age, unmarried and childless. The plaintiff was the administratrix of his estate, and brought suit for her own benefit. It will be useless to consume time in going over that part of the case that relates to the death and intestacy of the lad, Benjamin Pierson, alias Benjamin Lawson, through the carelessness and negligence of the defendant railroad company, as well as the marriage of his mother to one Lewis Pringle, who has not been known or heard of within the last seven years. All those questions of fact were found against the plaintiff. The naked issue to be considered here is the right of the mother, the plaintiff, to recover damages under Lord Campbell act for the killing of her illegitimate son, Benjamin Pierson, alias Benjamin Lawson. The circuit judge, in his charge, held that the mother could not be a legal heir to an illegitimate son, and the three grounds of appeal are as follows:

"First. Because his honor erred, it is respectfully submitted, in refusing to charge the plaintiff's eleventh request to charge, as follows: 'That if the jury find from the evi-

dence in this case that the plaintiff was never married to the said Lewis Pringle, either by ceremony or otherwise, and that the deceased was a bastard child of the plaintiff; yet, under the law in this state, she would have such a beneficial interest in him as would enable her to maintain this action,' in that the statute provides that every such action shall be for the benefit of the wife or husband and child or children, of the person whose death shall have so caused; and if there be no such wife or husband, or child or children, then for the benefit of the parent or parents, in that the plaintiff was the parent of the deceased, and his honor should have charged that she had such a beneficial interest in him as to give her the right to maintain this action.

"Second. It is respectfully submitted that his honor erred in charging the following request of the defendant: 'A bastard is not a child within Lord Campbell's act, under which [354] this action is brought, and the mother of a bastard child has no right of action for his homicide, nor can his administratrix maintain such an action. If you find from the evidence that the deceased was the illegitimate son of the plaintiff, then you must find a verdict for the defendant railway company.' 'I have already charged you that, and so charge you again.' Erred in charging that a bastard is not a child under Lord Campbell's act, because the mother is a parent, and it is provided in said act that the parent may maintain such an action, and it does not say that a parent of a bastard child cannot maintain such an action; erred in not charging that the mother has such a beneficial interest in her bastard child as to give her the right to any sum of money that might be recovered by the administratrix or administrator of a bastard child. Erred in charging that 'if you find from the evidence that the deceased was the illegitimate son of the plaintiff, then you must find a verdict for the defendant railway company.' Because the administratrix had the right to maintain this action as administratrix independently of her interest in whatever might be recovered.

"Third. It is respectfully submitted that his honor erred in charging that under section 2852, when it speaks of 'parent or parents,' it is just the same as if it was written 'legal parent or parents'; whereas, his honor should have charged that the mother of a bastard child is the parent, and

as had such a beneficial interest in him as to give her the right to maintain this action, and his honor should have held that the latter part of said section does not refer to a parent, because if the parent is the only beneficiary, then she takes the whole amount, and it is not necessary to refer to the statute of distributions to find out what amount she would be entitled to."

It will be seen, presented in different phases, that the question is the right of a mother of an illegitimate son to recover damages for his being illegally killed by the railroad, under the provisions of Lord Campbell's act. The plaintiff, appellant, claims that the word "parent," as used in that act has [355] no reference to the legitimacy of the offspring. As early as the year 1812, it was held by the court of equity in this state, as found in the two cases of Barwick v. Miller, 4 Desaus. 434, and Jones v. Burden, 4 Desaus. 439, by the judges in the court of appeals, except Judge James, that it was established law in this state that the mother of a bastard child, who dies intestate, cannot inherit either real or personal estate from her bastard child. 13 Cyclopedia of Law and Procedure, page 337, says: "It is a well-recognized rule of construction that prima facie the word 'child' or 'children,' when used in a statute, means legitimate child or children, and that bastards are not within the meaning of the terms, and, therefore, where parents are given the right of action for the death of a child, such action cannot be maintained by a parent for the death of a bastard."

A scrutiny of the case of Robinson v. Georgia R. R. etc. Co., 117 Ga. 168, 97 Am. St. Rep. 756, 43 S. E. 452, 60 L. R. A. 452, 555, shows that it holds exactly in accordance with this statement of the law. There seems to be but one decision, and that is in an Ohio case, Muhl's Admr. v. Michigan Southern Ry. Co., 10 Ohio St. 276, which seems to antagonize these views; but a careful examination of the text of this case will show that the question does not seem to have been thoroughly considered; but be that case as it may, there is no alteration in the last one hundred years in the attitude of the courts of this state to this question. A mother cannot inherit from her bastard child. It is useless to multiply words on this question, for we think the circuit judge was entirely correct in his charge on this

point, and the verdict of the jury thereon is conclusive of this matter.

It is the judgment of this court that the judgment of the circuit court be, and it is, affirmed.

Mr. Justice Gary did not sit in this case because of illness.

Death by Wrongful Act—Right of Mother of Bastard to Recover.—The doctrine of the principal case is supported by Robinson v. Georgia R. & B. Co., 117 Ga. 168, 97 Am. St. Rep. 156, Alabama etc. R. R. Co. v. Williams, 78 Miss. 209, 84 Am. St. Rep. 624, McDonald v. Pittsburgh etc. Co., 144 Ind. 459, 55 Am. St. Rep. 185, Marshall v. Wabash R. R. Co., 46 Fed. 269, and Clarke v. Carfin Coal Co., [1891] App. Cas. 412, and must be conceded to be established by the decided weight of authority. In Missouri, however, the statute making an illegitimate child capable of inheriting from its mother, and she from it, has been held to entitle her to maintain an action to recover for its death due to the negligence of the defendant. Marshall v. Wabash R. R. Co., 120 Mo. 275.

RILEY v. CHARLESTON UNION STATION COMPANY.

[71 S. C. 457, 51 S. E. 485.]

CONSTITUTIONAL LAW—Eminent Domain.—A statute granting to a corporation the right to condemn lands for a certain public use is not unconstitutional as depriving the person whose property is condemned of his property without due process of law and without just compensation, in that it does not provide some tribunal to determine any question made by land owners as to the right of the corporation to condemn lands. (p. 580.)

EMINENT DOMAIN—Constitutional Law.—A statute authorizing a corporation to condemn lands for union depot purposes authorized such condemnation for a public use, and is therefore constitutional. (p. 582.)

EMINENT DOMAIN—Constitutional Law.—A corporation organized under statutory authority to erect a union passenger depot, and to condemn lands therefor, is organized for the public use, and its acts, if regular, are valid, and the fact that railroad companies, who are stockholders and whose officers are officers in such corporation and own sites suitable for such depot station, is immaterial. (p. 584.)

CONSTITUTIONAL LAW—Title of Statutes.—A statute authorizing the incorporation of a union depot company does not violate a constitutional provision requiring that a statute shall relate to but one subject, which shall be expressed in its title, in that it authorizes railroad companies to subscribe to and hold its stock, and to guarantee its bonds. (p. 585.)

EMINENT DOMAIN—Public Use.—The question whether a use is public depends upon the nature of the use, and not upon the possessions of the particular individuals or corporations that may be interested in such use. (p. 585.)

CONSTITUTIONAL LAW—Title of Act.—If a statute expresses in its title the object of the act, such title embraces and expresses any lawful means to achieve such object. (p. 588.)

CONSTITUTIONAL LAW—Special Acts.—A statute authorizing a corporation to build a union depot does not violate a constitutional provision prohibiting the amending of charters by special act, by granting to several railroads such power and right, when such statute is enacted, under a concurrent resolution. (p. 586.)

EMINENT DOMAIN — Necessity — Question of Law.—The question whether a particular parcel of land is necessarily required to be condemned for railroad purposes is for the courts. (p. 587.)

EMINENT DOMAIN—Property Subject to Condemnation.—If a corporation is formed to erect a union depot, with power to condemn land, and it owns no property which may be used for that purpose, it is no abuse of its discretion that it seeks to condemn certain land, for the purpose named without attempting to use the land of certain of its stockholders which might be adapted to the purpose of the depot. pp. 587, 588.)

EMINENT DOMAIN—Defenses.—If it is sought to enjoin the condemnation of land authorized by statute, the fact that the person whose land is sought to be condemned was not given personal notice of the introduction in the legislature of the bill authorizing such condemnation is immaterial. (p. 588.)

Bryan & Bryan, for the appellants.

J. W. Barnwell, W. H. Fitzsimons and P. H. Gadsden, for the respondent.

[482] JONES, J. This is an action for a perpetual injunction against condemnation proceedings instituted by the Charleston Union Station Company, under an alleged power contained in the act of the General Assembly incorporating the defendant company, approved February 20, 1902: 23 Stats. 1168. The decree of the circuit court, reported herewith, refused injunction, and dismissed the complaint, after a full and able consideration of the questions presented. The plaintiffs appeal upon exceptions, reported in full herewith, which, without further statement, we proceed to consider.

The first, second, fourth and fifth exceptions make the point that the act under which the defendant seeks to condemn plaintiffs' property is unconstitutional, in that no tribunal is provided for the determination of any question that may be made by the land owner as to the right and power of the defendant company to take plaintiffs' property. This contention cannot be sustained. While it is true the condemnation statutes provide no special tribunal, except for the determination of the [483] amount of compensation to be paid, nevertheless the regular machinery of the courts is available for the determination of any issue with respect to the right and power to condemn: Riley v. Charles-

ton Union Station Co., 67 S. C. 84, 45 S. E. 149. The remedy provided by the condemnation statute is exclusive only as to matters falling within its provisions. These statutes, in conjunction with the general law, provide for full hearing before a lawful tribunal after due notice, and thus answer every requirement of the federal and state constitutions with reference to due process of law. A sufficient answer to appellants' contention in this regard is the fact that in these proceedings they have rightfully invoked the machinery of the court of equity to determine the issues which they have raised, have had full trial thereon, and now are having the same reviewed by this court.

The second specification of the second exception objects to that portion of the decree of the circuit court wherein the court said: "Nor are the provisions of the fourteenth amendment of the constitution of the United States violated. One of the attributes of state sovereignty is the right of eminent domain, the right of providing for the taking of private property for public uses. Each state, by virtue of its statehood, has the right to exercise the power of eminent domain. This is doubted nowhere, and the provisions of the federal constitution do not relate to the eminent domain of the state." Appellants' ground of objection is that the provisions of the federal constitution, and particularly the fourteenth amendment, do relate to and control the law of eminent domain of South Carolina. The exception puts an erroneous interpretation on the meaning of the circuit judge. The objectionable language was in the quotation from 10 Encyclopedia of Law, second edition, 1052, which was based upon Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672. The case cited was decided in 1833, and related to the fifth amendment, declaring that private property shall not be taken for public use without just compensation, which the court said was intended solely as a limitation on the exercise of the power [484] of the federal government, and was not applicable to legislation of the states. Judge Dantzler did not intend to say that the provisions of the fourteenth amendment had no relation to the exercise of eminent domain by the state, but that such amendment was not violated by the statutes in question, as he proceeds to show that the condemnation proposed was for a public use, and that the statutes made ample provision

for the protection of property owners and for compensation for property so condemned.

The third exception imputes error in holding that the property sought to be condemned is for public use; whereas, the facts show that it is to be taken for private use, in violation of article 1, section 17 of the state constitution. This exception cannot be sustained. The defendant company was incorporated for the purpose of constructing, maintaining and operating a union passenger station in the city of Charleston, and, to this end, was given the right to acquire, by purchase, lease or condemnation, all property necessary for the same, and to have the general powers and to be subject to the general restrictions imposed by law upon railroad corporations. By section 3, power was given to acquire such real estate as may be necessary to construct, maintain and operate a union passenger station, comprising passenger depots, office buildings, sheds, storage-rooms and yards; also main and sidetracks, switches, cross-overs, turnouts, bridges and other terminal railroad facilities, appurtenances and accommodations suitable in size, location and manner of construction, to perform promptly and efficiently the work of receiving, delivering and transferring all passengers, baggage and mail and express matter of railroad companies using said station, etc., with power to condemn lands for such purpose, under sections 1743 to 1755 of the Revised Statutes of 1893, and amendatory statutes.

If defendant company is not, in fact, a railroad company, its main purposes are clearly within the objects of a regular railroad company, and it is so closely analogous thereto as to warrant the court in applying to it the same rule that would [485] be applied to a regular railroad corporation in determining whether the property sought to be condemned is for a public use.

If it should be conceded that the use of a union passenger station is private, appellant would have to reckon with the case of Boyd v. Winnsboro Granite Co., 66 S. C. 433, 45 S. E. 10, which, construing article 1, section 17, article 17, with article 9, sections 2 and 20 holds: "That private property shall not be taken for private use without the consent of the owner except in cases where this power is conferred upon corporations by the general assembly, and then only in the manner prescribed in section 20, article 9."

The first general principle which must control this question is, when the legislature, in effect, declares that the construction, maintenance and operation of the union passenger station in the city of Charleston is a public purpose so as to authorize the condemnation of property, this conclusion is binding on the court if there be any reasonable ground to support it: Chicago etc. Ry. Co. v. Morehouse, 112 Wis. 11, 88 Am. St. Rep. 918, 87 N. W. 849, 56 L. R. A. 240. But independent of the implication from the statute chartering the defendant company that the use is a public one, there is no room to doubt, from the testimony, that a union passenger station with appurtenant facilities in the city of Charleston would be a great and direct benefit to the traveling public. It is not easy to give a definition of public use which will be adequate to cover every case that may properly fall within the terms, and this case does not call for an attempt to define the terms. Some cases take the very broad view that "public use" is synonymous with "public benefit." A more restricted view, however, would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain. Judge Cooley, in his Constitutional Limitations, 654, says: "The public use implies possession, occupation and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it [486] in the hands of the owner, and turning it over to another on vague grounds of public benefit, to spring from a more profitable use to which the latter will devote it." In Lewis on Eminent Domain, section 165, it is said that "public use" means the same as "use by the public." These definitions involve the idea that the public must have a definite and fixed use of the property to be condemned, independent of the will of the person or corporation taking title under condemnation, and that such use by the public is protected by law: Fallsburg Power etc. Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, 61 L. R. A. 129. The case of Healy Lumber Co. v. Morris, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681, 63 L. R. A. 820, holds that "a public use must be either a use by the public or by some quasi public agency, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity." If we accept either of these views

of the meaning of "public use," the defendant company is clearly chartered for a public purpose, and the condemnation of property for the construction, maintenance and operation of a union passenger station in the city of Charleston is for a public use. No one doubts now that the laying of railroad tracks and the erection of depots by a regularly chartered railroad company is for such public use as to justify the exercise of eminent domain under the condemnation statutes. This franchise is, in its nature, as public as a franchise to transport passengers for hire. The defendant company is designed to carry out the same public use by affecting such a public utility as a union passenger station, involving the necessary railroad tracks, depots and terminal facilities for accommodation of the public. The public, independent of the will of the defendant, and protected by law, has a fixed and definite right to use this station in dealing with the defendant company, or the railroad companies using the station in their business as common carriers of passengers.

The fact that the Southern Railway Company and the Atlantic Coast Line Railroad Company are the principal stockholders in the defendant company and the officers of the defendant [487] company are officers in said railroad companies cannot affect this question, for the use is still a public use, whether considered with reference to the defendant company or with reference to the stockholding companies, as these railroad companies, as common carriers, are public agencies, and it is within the purpose of their organization to own or control depot facilities required for their business and the needs of the community. Nor is the question whether the use is a public use at all affected by the alleged fact that each of the railroad companies holding stock in the defendant company has one or more sites of its own said to be suitable for a union passenger station. The question whether the use is public depends upon the nature of the use and not upon the possessions of the particular individuals or corporations that may be interested in such use. Whether the last-mentioned fact influences the question whether there is a necessity for condemning plaintiff's property belongs more properly to the consideration of other exceptions to be hereafter noticed.

The sixth exception raises the point that the act incorporating the defendant company violates section 7, article

3, of the state constitution, in that it relates to more than one subject expressed in its title, since it not only incorporated the defendant company, but amended the existing charters of the Atlantic Coast Line Railroad and the Southern Railway by a special law, and not by a general law, which is forbidden by article 9, section 2, of the constitution. The title of the act is to incorporate the "Charleston Union Station Company," but in section 5, the statute gives the power to subscribe for and hold the stock and to guarantee and hold the bonds of the defendant company. The case of Connor v. Green Pond etc. R. R., 23 S. C. 427, holds that "An act to incorporate the Green Pond, Walterboro and Branchville Railroad Company" does not relate to more than one subject expressed in its title, because of the fact that the act also authorized the county of Colleton to subscribe to the capital stock. The principle upon which the case rests is "that when an act of the legislature expresses in its title the object [488] of the act, the title embraces and expresses any lawful means to achieve the object": San Antonio v. Mehaffy, 96 U. S. 315. When the creation of a corporation is the subject, it necessarily includes the powers to be given it: Ex parte Bacot, 36 S. C. 135, 15 S. E. 204, 16 L. R. A. 586. Among the powers granted was the right to sell its stock and bonds to the railroad companies entering the city of Charleston and using said station. But while the principle is admitted, it is contended that it does not apply here, because the act incorporating the defendant company was a special act containing an amendment to the charters of said railroad companies in the particulars mentioned, contrary to article 9, section 2, of the constitution, which provides: "The General Assembly shall provide by general law for the changing or amending existing charters"; and in view of this last-named clause of the constitution, adopted since Connor v. Green Pond R. R. Co., 23 S. C. 427, was decided, the said amendatory provisions constitute a subject not embraced in the title. This question will be necessarily involved in the consideration of the seventh and eighth exceptions, which raise the question that the act incorporating the defendant company violates article 9, section 2, quoted above, and also article 3, section 34, which prohibits a special law when a general law can be made applicable.

The circuit court has disposed of this question very conclusively by construing these provisions of the constitution together. Section 2, article 9, of the constitution, quoted in full, is as follows: "No charter of incorporation shall be granted, changed or amended by special law except in the case of such charitable, educational, penal or reformatory corporations as may be under the control of the state or may be provided for in this constitution, but the General Assembly shall provide, by general laws, for changing or amending existing charters, and for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration; provided, that the General Assembly may, by a two-thirds vote of each House, [489] on a concurrent resolution, allow a bill for a special charter to be introduced, and when so introduced may be passed the same as other bills." The above proviso clearly makes an exception to the general rule forbidding a special law when a general law can be made applicable, by providing that a special charter may be granted under the conditions named. In this case the conditions exist, and the statute recites the fact that a concurrent resolution allowing the bill to be introduced has been passed by a two-thirds vote of each House, as required by statute.

The ninth and tenth exceptions allege error in not holding that defendant company is not duly incorporated, organized and authorized to commence business under the terms of the act of corporation, because the act authorized the company to organize and commence business when fifty thousand dollars had been subscribed to the capital stock, the evidence shows that nine-tenths thereof is invalid stock subscriptions of Southern Railway Company and Atlantic Coast Line Railroad Company, such invalidity resting in the contention that the special act incorporating the company is void, under section 2, article 9, of the constitution. This contention has been overruled in the consideration of the seventh and eighth exceptions above.

The eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth exceptions bring up the question of fact, whether the property sought to be condemned is necessary for the purposes of the corporation. The case of South Carolina R. R. Co. v. Blake, 9 Rich. 228, shows that the grantee of the power to condemn

lands is not the sole judge whether any particular parcel of land is required for the purposes of the road, and that the final determination of this question rests with the courts. This is in accord with many authorities cited in 88 Am. St. Rep. 946, note. Nevertheless, it is right that weight should be given to the fact that the grantee to whom the statute has delegated the power to condemn has decided that the particular land in question is required. As said in Smith v. Chicago etc. R. R. Co., 105 Ill. 511, and repeated in O'Hare v. [490] Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. 923: "Every company seeking to condemn land for public improvement must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose. This right, however, is subordinate to the right of the courts to prevent an abuse of the power by restricting its exercise to the reasonable necessities of the case, since to take more than reasonable necessity requires is to appropriate private property to private use."

We have carefully considered the testimony in view of these principles and see no just ground for overruling the decision of the circuit court that such reasonable necessity exists It is strenuously contended by appellant that no reasonable necessity exists, because the testimony shows that the Southern Railway Company and the Atlantic Coast Line Railroad Company, holding the greater portion of the capital stock of the defendant company, each have lots suitable for the erection thereon of a union station, and that equity and good conscience would not allow these companies associated under the name of the Charleston Union Station Company to condemn the property of plaintiff for said purposes.

In a proper case the court of equity would undoubtedly look beyond the corporate entity to its constituent stockholders as the real parties in interest, associated under the name of the corporation. But we find nothing in this case which calls upon this court to ignore the rights of defendant as a corporation to condemn the lands of others for a public use, founded in reasonable necessity. So far as appears, the defendant company owns no property which it may use for the purpose named. It would be a bold and far-reaching doctrine to announce that no quasi corporation could condemn property of a nonstockholder for public use as long as any stockholder had property which might be

used for the purpose. Such a rule would lead the court into an impenetrable maze to ascertain and adjust the rights and claims of the various stockholders as to whose property should be taken and whose left. The safer rule is that the [491] grantee of the power to condemn must not abuse the discretion confided by the legislature and spoliate private property by taking, for pretended public use, more than a reasonable necessity requires. We find no abuse of discretion or bad faith in defendant's proposal to condemn plaintiffs' property, and the general rule is that if there be no bad faith or abuse of discretion on the part of the grantee in the matter of location, his discretion will not be interfered with: 10 Ency. of Law, 2d ed., 1057, and cases cited in note 1. A somewhat similar contention was made in Kansas etc. Coal Ry. v. Northwestern Coal etc. Co., 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684, 51 L. R. A. 936, and was overruled by the court. We do not find in the case anything to warrant a conclusion that the organization of the defendant company is a scheme by the Southern Railway Company and the Atlantic Coast Line Railroad to do something which they could not lawfully do under their own chartered powers. They have become stockholders in defendant company by authority of a valid act of the legislature, and the plan of organizing the defendant company for the purpose of securing an important public utility in the line of their own chartered purpose has legislative sanction. The case presented has no similarity to the Northern Securities Case, 193 U. S. 358, 24 Sup. Ct. Rep. 436, 48 L. ed. 679, and other cases on that line relied on by appellants, relating to combinations in restraint of trade, in violation of anti-trust legislation. These conclusions also require that the twentieth, twenty-first and twenty-second exceptions be overruled.

The twenty-third exception, relating to striking out all the testimony of Mr. John Riley in reference to the introduction of the bill to incorporate the defendant, is untenable. The purport of the testimony was that Mr. Riley received no personal notice of the introduction of the bill in the Senate, and thus had no opportunity to attempt to have the bill amended in the Senate, by striking out the condemnation clause, although he knew, from the newspapers, of the passage of the resolution authorizing the introduction of the bill, and as a matter of fact was heard by

492 the House committee in opposition to the bill. The ruling of the circuit court was quite proper. The testimony was wholly irrelevant to any issue in the case, and even if it had been permitted to remain as a part of the record, it could be of no consequence in affecting the result of this case.

We find no error in refusing injunction sought and in dismissing the complaint.

The judgment of the circuit court is affirmed.

Land may be Condemned Under the Power of Eminent Domain for use for a railroad depot or station: See the monographic note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 826, on uses for which the power of eminent domain cannot be exercised.

The Existence of a Public Use as a question for the consideration of the courts is the subject of an extended note to Chicago etc. Ry. Co. v. Morehouse, 88 Am. St. Rep. 926-946.

ZIMMERMAN v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

[71 S. C. 528, 51 S. E. 243.]

TELEPHONE COMPANIES—Construction of Grant of Right of Way.—A grant to a telephone company of the right to erect a line "over and along" certain property, with the right to place poles along the highway adjoining such property, does not confer any right to erect a line or place poles diagonally across the grantor's property. Such grants must be strictly construed. (pp. 590, 591.)

R. K. Carson, for the appellant.

D. E. Hydrick and Johnson & Nash, for the respondent.

529 JONES, J. The plaintiff brought this action against defendant for damages to his lot in the town of Duncans, Spartanburg county, by reason of defendant's construction of its telegraph lines over the same, which resulted in a judgment for three hundred dollars in plaintiff's favor.

The defendant sought to justify its action in the premises under the instrument executed by plaintiff, which is as follows:

"$100. Received of the American Telephone and Telegraph Co., of South Carolina, one dollar in consideration of which I hereby grant unto said company, its successors and

assigns, the right to construct, operate and maintain its lines over and along the property which I own or in which I may have any interest, in the township of Beech Springs and town of Duncans, county of Spartanburg, State of South Carolina, including necessary poles and fixtures along the roads, streets or highways adjoining the property owned by me in said town, said sum received in full payment for such right, and in full satisfaction for the trimming of any trees along said lines necessary to keep the wires cleared at least eighteen inches, and with the right to set the necessary guy and brace poles, and attach to trees the necessary guy wires. Any damage done to crops in construction or repairing said lines to be paid by the said company.

"Witness my hand and seal, this 9th day of May, A. D. 1901, at Duncans, S. C."

520 In the complaint plaintiff alleges that said agreement was signed with the distinct understanding that only one pole was to be placed on said land, and at a different part of the lot from where the line was constructed, and at a place where the wires and poles would not interfere with the lot for building purposes, and plaintiff offered parol testimony to show the same. To this defendant objected on the ground that it tended to vary the written instrument above. The court admitted the testimony, and to this ruling in various forms the first seven exceptions are directed. The remaining exception charges error in the construction of said instrument.

In construing the instrument, the court charged the jury that it was silent as to the location and number of poles. This charge is not wholly free from error, but the error was not prejudicial to appellant as we construe the instrument. The instrument does not give the defendant an unrestricted right to construct its line upon any part of plaintiff's lot. Observe the language: "To construct, operate and maintain its lines over and along the property—including necessary poles and fixtures along the roads, streets or highways adjoining the property."

Such contracts are to be construed in the light of the circumstances. The lot in question was in the town of Duncans, fronting on Main street one hundred and seventy-two yards, and on Welford street one hundred and twenty yards. The right was not given to construct the lines over

and upon plaintiff's land wherever it might suit defendant's interest or convenience, but over and along the premises, with right to place poles along the streets, etc. The word "along" means by length of, as distinguished from "across." The parties, by the terms of the instrument, had in mind that the construction would be on the lot along the streets adjoining, but not across the lot. The case might have been different if the grant had been to construct the lines over and upon the property and along roads, etc., adjoining: Southern Bell Tel. etc. Co. v. Harris, 117 Ga. 1001, 44 S. E. 885. Where one had [531] a way "in, through, over and along a certain strip of land from A to B, it was held that he had not thereby a right to a way across the strip of land": Washburne on Easements, 3d ed., p. 255. Such instruments are to be strictly construed.

The undisputed evidence in this case was that defendant's line, entering the lot sixty-five yards from Main street, ran diagonally across the lot one hundred and eighty-five yards to the corner of Main and Welford streets. As the instrument, strictly construed, did not authorize the construction of the line diagonally across plaintiffs' lot, it was more favorable to the defendant than he was entitled to for the court to charge that the contract was silent as to the location of the line, and to submit to the jury to determine whether the location by defendant was within the contract. For the same reasons, it must follow that there was no prejudicial error to allow plaintiff to introduce parol testimony of an understanding had with defendant's agent, when the instrument was executed, to the effect that the line should not cross plaintiff's lot except at a certain corner, and that not exceeding one post should be placed upon the land. If the instrument had been such as to grant defendant the right to cross plaintiff's lot in any line defendant should locate, it would not have been competent (in the absence of allegation of fraud) to show a contemporaneous parol agreement or mutual understanding that the line should be located in a different way from that adopted by the defendant, as that would violate the salutary rule which forbids parol testimony to vary or alter a written instrument. But as defendant's location was not authorized by any written instrument, it is manifest that defendant sustained no injury by the court's ruling, as defendant was defenseless, unless a parol permission to cross plaintiff's land in the

way located should be shown. To this end defendant, in its testimony, sought to establish an agreement between plaintiff and defendant at time of construction or afterward, under which defendant was to remove the poles as located at any time that the line might interfere [532] with contemplated improvements on the lands by plaintiff, and at defendant's request, the jury were instructed if such an agreement was established, the plaintiff could not recover unless defendant refused to move the poles when requested.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

In Construing a Grant of a Right of Way, courts give effect to the intention of the parties as disclosed by the surrounding circumstances and the situation of the parties, provided the intention thus disclosed is not inconsistent with the language of the grant: Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864. It has been held that under a grant of a right of way across a lot, the grantee has no right to enter at one place, go partly across, and then come out at another place on the same side of the lot; and that parol evidence to show that such was the intention of the grant is inadmissible: Comstock v. Van Deusen, 22 Mass. (5 Pick.) 163.

RILEY v. TOWN OF GREENWOOD.

[72 S. C. 90, 51 S. E. 532.]

MUNICIPAL CORPORATIONS—Ordinances—Injunction.—An action to have a municipal ordinance declared invalid, and the city authorities enjoined from enforcing it, on the ground that by its enforcement plaintiff's property will be injured, is not an action in tort, but one for equitable relief. (p. 596.)

MUNICIPAL CORPORATIONS — Ordinances — Validity. — A city ordinance directing and compelling the removal of a fence erected on private property, not subject to a public easement, is illegal and void, as an attempt to take private property without compensation. (p. 596.)

MUNICIPAL CORPORATIONS—Invalid Ordinances.—Prohibition is not the appropriate remedy for relief from an invalid city ordinance which is an illegal attempt to take private property without compensation and without due process of law. (p. 596.)

MUNICIPAL CORPORATIONS — Illegal Ordinance—Injunction.—If a municipal corporation by means of a city ordinance is attempting to carry into effect an illegal act, it may be enjoined, provided there is ground for equitable relief. (p. 596.)

MUNICIPAL CORPORATIONS—Invalid Ordinances—Injunction.—If a city ordinance requires the mayor of the city to remove any obstruction interfering with the free use of a certain alley, and by virtue of such ordinance he is about to remove a fence from private property, not subject to a public easement, there is a continuing menace to the rights of the owner of such property authorizing equitable relief by injunction. (p. 597.)

F. B. Grier, for the appellants.

Johnstone & Cromer and McGhee & Richardson, for the respondent.

[92] GARY, J. This is an appeal from an order overruling a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The following statement appears in the record: "This action was instituted for the purpose:

"1. Of having an ordinance of the town of Greenwood declared ultra vires, and enjoining defendants from undertaking to enforce the same.

"2. To enjoin the defendants from undertaking to exercise any control over her land on which she erected a fence as alleged in the complaint.

"3. To enjoin defendants from interfering with the use and control of her land upon which the said fence was erected."

The complaint (omitting the formal parts thereof) alleges: "That an alley, twelve feet wide, owned by the plaintiff, Durst and Matthews, and others, runs from the public square in an easterly direction, back to her lot of land above described; that from the eastern terminus of this alley, one hundred and seven feet from the public square, a road of the same width and in the same direction leads across her said lands to her livery-stables on the same; and that the said alley has for years been used by the tenants and customers of her said livery-stables, and by the occupants of the adjacent property of Durst and Matthews and their customers. That prior to the date hereinafter stated, and for the purpose of maintaining and protecting her rights in her said property and preventing the unauthorized use of the same by persons traveling to and from the rear of the store on the said lot of Durst and Matthews, owned by the defendant, J. K. Durst, and others, she erected a fence on her said lot, along the northern side of the road above described as leading [93] from the terminus of the said alley

to her livery-stables, the said fence running from the terminus of the said alley, parallel with said lot of Durst and Matthews, but being solely on her said land.

"That on the tenth day of June, 1904, the said town council of Greenwood passed an ordinance as follows:

" 'Be it ordained by the town council of Greenwood:

" '1. That the public alleyway leading from the public square to the old stables owned by Mrs. S. J. Riley, in the town of Greenwood, is here' y required to be kept open and free from obstructions of any kind.

" '2. That the free use and enjoyment by the public of said public alleyway mentioned in section 1 hereof must not be interfered with or obstructed in any wise, and any person or persons who shall obstruct the said alley in any way or interfere with the free use thereof shall be fined not less than five dollars nor more than one hundred dollars, or be imprisoned not less than three days nor more than thirty days.

" '3. The mayor of the town of Greenwood is hereby directed and required to remove any obstruction placed in said alleyway, or any obstruction along the same which tends to interfere with the free use thereof.'

"That the defendants, acting under authority attempted to be conferred by the said ordinance, unlawfully entered upon said land, and by their servants and agents with force and violence tore down and destroyed her said fence.

"That the alley mentioned in the said ordinance is that described in the third paragraph of this complaint; that it has never been dedicated to the public, and the pu' lic has acquired no right to it by deed or otherwise; that it has not been subject to the control of the defendants or of the public; and that the fence was not in the alley and did not obstruct the same.

"That the conduct of the defendants in passing the said ordinance and in destroying her fence was an arbitrary attempt to deprive her of her property without due process 94 of law and for the benefit of private individuals, and that the said ordinance is ultra vires and void.

"That the constant menace of the said ordinance, backed by the police authority of the defendants, denies to her the quiet and peaceable use and enjoyment of her said property, guaranteed by the constitution, leaves her without any ade-

quate remedy at law, and warrants the intervention of this court in her behalf."

The first ground of demurrer was as follows: "1. The allegations of the complaint show that the alleged fence was not in or upon the alleged alleyway mentioned and referred to in the ordinance set out in the complaint; that the said fence is wholly upon the private property of the plaintiff in this action, and the ordinance of the town of Greenwood, set out in the complaint, shows upon its face that it refers entirely to an alleyway of the said town without reference to any private property of the plaintiff, and the facts stated in the complaint, therefore, fail to show any connection whatever between the alleged action of the officers and agents of the said town and the said ordinance under which they are alleged to have acted."

The ordinance assumes as a fact that the public alley extends all the way back to the plaintiffs' stables; and it provides against obstructions in or along the alley at any point before it reaches the stables. The provision by which the mayor is "required to remove any obstruction placed in said alleyway, or any obstruction along the same, which tends to interfere with the free use thereof," clearly shows that the ordinance contemplated that the free use of the alley should include the right to turn aside from it. In short, it shows that it was intended to prevent such an obstruction as the plaintiff's fence along the alley, at any point before reaching the stables, in order that the public might be enabled to turn aside from the alley. It cannot, therefore, be successfully contended by the appellant that the fence was on the plaintiff's land, and that there was no 95 connection between the ordinance and the acts of its officers in removing the fence as an obstruction.

The second ground of demurrer was as follows: "2. The complaint shows upon its face that the ordinance of the town required the alleyway to be kept free from obstructions, but fails to show that it in any wise authorized or required its officers or agents to interfere with the private property of this plaintiff, and in alleging that its officers and agents did so interfere with said private property, the complaint charges a tort on the part of the said officers and agents for which this defendant is in no wise responsible."

It is only necessary to refer to the statement hereinbefore mentioned relative to the purposes of the action, to show

that this is not an action for damages arising from tort, but for equitable relief. It is true, the destruction of the fence was connected with the plaintiff's alleged injury to her rights, but it was merely incidental, and was not relied upon as the foundation of her action.

The third ground of demurrer was as follows: "The allegations of the complaint show a tort on the part of certain individuals, for which this defendant is not responsible." This ground is disposed of by what was said in considering the other grounds.

The fourth ground of demurrer was as follows: "The ordinance, set out in the complaint, shows on its face that it is a valid ordinance, properly passed, and relates to a public alleyway of the town of Greenwood, over which the defendant has full control." If the facts alleged in the complaint are true, that the plaintiff is owner of the land upon which the fence was erected, and that it was not subject to a public easement, then the ordinance was illegal, on the ground that it, in effect, undertook to acquire an easement without just compensation being first made therefor, as required by the constitution (article 1, section 17); and was likewise inimical to article 1, section 5, of [90] the constitution, which provides that a person shall not be deprived of his property without due process of law.

The fifth ground of demurrer is as follows: "The allegations of the complaint show that the plaintiff has a full, complete and adequate remedy at law for all of the acts complained of and set out in the said complaint." It is contended by the appellant that prohibition was the appropriate remedy, under the facts alleged in the complaint. The alleged vice in the ordinance was not based on the ground that the municipality did not have power and jurisdiction to enact ordinances generally, in regard to the streets and alleys, but on the ground that the ordinance in question was illegal, as an attempt on the part of the appellant to take the property of the plaintiff without compensation, and to deprive her of her property without due process of law. Under such circumstances, prohibition is not the appropriate remedy: State v. Kirkland, 41 S. C. 29, 19 S. E. 215.

The sixth ground of demurrer was as follows: "The allegations of the complaint show a trespass on private property by the officers and agents of this defendant, for

which it is not liable, and do not connect the alleged acts in any wise with the ordinance of this defendant." This ground has already been disposed of.

The seventh ground of demurrer was as follows: "The facts stated in the complaint fail to show any equity whatever, and plaintiff's complaint is without equity and does not entitle plaintiff to injunctive relief, or to any relief whatever against this defendant." When a municipal corporation is attempting to carry into effect an illegal act, it may be enjoined, if there are grounds for equitable interference: Vesta Mills v. Charleston, 60 S. C. 1, 38 S. E. 226; Wilkins v. Gaffney, 54 S. C. 199, 32 S. E. 299. The requirement in the ordinance for the mayor to remove any obstruction which tends to interfere with the free use of the alley contemplated the removal of obstructions as often as they were placed in or along the 97 alley. It was, therefore, a continuing menace to the rights of the plaintiff, as alleged in the complaint, and could properly be made the basis of equitable relief: McClellan v. Taylor, 54 S. C. 430, 32 S. E. 527; Ragsdale v. Southern R. R., 60 S. C. 381, 38 S. E. 609; 3 Pomeroy's Equity Jurisprudence, sec. 1345.

It is the judgment of this court that the judgment of the circuit court be affirmed.

That an Injunction will lie against the enforcement of an invalid municipal ordinance which declares certain buildings nuisances, and provides for their removal and the punishment of the builders, see the recent case of Boyd v. Board of Council of Frankfort, 117 Ky. 199, 111 Am. St. Rep. 000.

The Writ of Prohibition is the subject of an extended monographic note to State v. Superior Court, 40 Wash. 555, 111 Am. St. Rep. 000.

DAVENPORT v. CHARLESTON AND WESTERN CAROLINA RAILWAY.

[72 S. C. 205, 51 S. E. 677.]

RAILROADS—Liability for Tort of Trainmen.—The act of a trainman in throwing bricks at a dwelling-house near the track from a moving train does not render the railroad company employing him liable therefor. (p. 599.)

S. J. Simpson and Cooper & Simpson, for the appellant.

F. P. McGowan and R. E. Rabb, for the respondent.

205 JONES, J. In my view, the appellant's exceptions should be sustained. In the case of Rucker v. Smoke, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40, the court very clearly states the rule which governs the liability of a principal for the acts of his servants, in this language: "When one person invests another with authority to act as his agent for a specified purpose, all the acts done by the agent in pursuance or within the scope of his agency are and should be regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him."

206 Accordingly, in Skipper v. Clifton Mfg. Co., 58 S. C. 143, 36 S. E. 509, the complaint was held to state a cause of action against the defendant in alleging that its engineer, while in charge of and running defendant's dummy engine, maliciously blew the whistle in close proximity to plaintiff's mule, thereby causing it to run away and overturn plaintiff's buggy, throwing her out, to her damage. In that case the engineer had control of the engine, and the blowing of the whistle was a part of its operation, so that he was acting within the scope of his agency.

In the case of Polatty v. Railway Co., 67 S. C. 391, 100 Am. St. Rep. 540, 45 S. E. 932, a nonsuit was denied because the evidence tended to show a case in which the defendant's engineer, in charge of its engine, threw coal at a trespasser upon the tender or platform adjoining, for the purpose of ejecting him, thereby causing him to fall and be injured. Here the tortious act of the engineer was done in

protecting, in an improper manner, the property of his principal placed in his charge from a trespasser, and so was clearly within the apparent scope of his agency.

The present complaint cannot be made to fall within the rule stated. It is true the complaint states that the tortious act complained of was done by the servants of the defendant, "while in the employment of the defendant and in the discharge of their duties on said train," but the other facts alleged in the complaint must be considered in determining the meaning of these words, in so far as they may be construed as alleging facts rather than conclusions of law. The fact that the defendant's servants were in its employment at the time of committing the acts complained of has no tendency to show that the acts were within the apparent scope of their agency, and it may be conceded that on the occasion of the injury complained of the said servants were in the general discharge of their duties on the train, and still the complaint would fall short of stating that the particular acts complained of were performed in pursuance or in the discharge of some duty which would make the throwing [207] of a brick at another within the scope of that duty. Facts should be stated in the complaint from which the court could reasonably infer that the particular tortious act was performed within the scope of the employment of the agency. The plaintiff was not a passenger, so as to be under the protection of the defendant's servants, nor a trespasser, so as to call upon the servants to protect the principal's property. The only agency alleged is that the defendant's servants were in control of defendant's freight train. It is not suggested in the complaint that the train was freighted with brick, and that the alleged injury happened while the servants were unloading, but, on the contrary, it appears that the train was on its journey and that the brick or stone was deliberately thrown, being aimed at the plaintiff's dwelling. It is inconceivable that it could be within the scope of such an agency, the control and operation of a freight train, to rock plaintiff's dwelling-house as the train passed along, when she was in no wise interfering with the train's operation. If it was intended to allege a case in which the defendant company ordered its servants to throw stones at plaintiff's dwellling, the allegations should have been framed with that view.

In the case of Cobb v. Columbia etc. Ry. Co., 37 S. C. 194, 15 S. E. 878, this court granted a new trial because the circuit court instructed the jury that if the shouting of the train hands caused the runaway of the plaintiff's horse, to his injury, the defendant company was liable. These train hands were in the employment of the company, and on the train in the discharge of their duties, but the particular act of shouting or making a noise had no conceivable reference to the management or operation of the train or the performance of any of their duties as train hands.

For these reasons, I think the judgment of the circuit court should be reversed.

A Master is not Liable where his servant steps aside from the master's business and maliciously and wantonly commits a tort for the accomplishment of his own purposes. The test is not whether the act was done during the existence of the employment, but whether it was done in the transaction of the master's business: Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909. A master is liable for the willful or malicious acts of his servant, if committed within the scope of his duty, but not if they are committed outside the scope of his employment: Pollatty v. Charleston etc. Ry. Co., 67 S. C. 391, 100 Am. St. Rep. 750; Rahmel v. Lehndorff, 142 Cal. 681, 100 Am. St. Rep. 154; Deck v. Baltimore etc. R. R. Co., 100 Md. 168, 108 Am. St. Rep. 399; monographic note to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 71-93.

GENERAL ELECTRIC COMPANY v. SOUTHERN RAILWAY.

[72 S. C. 251, 51 S. E. 695.]

CARRIERS—Bills of Lading—Delivery.—Any effort on the part of the carrier to surrender a shipment of freight at variance with a bill of lading drawn "to order" is at his peril, and he must be prepared to pay the full value of the shipment, or take upon himself the burden of proving himself justified in making such surrender. (pp. 602, 603.)

EVIDENCE—Declarations to Prove Representative Capacity.—A witness cannot establish his representative capacity by his own declarations alone. (p. 603.)

CARRIERS—Bill of Lading "to Order"—Delivery.—If goods are shipped under a bill of lading "to order" of the shipper, "notify" a third person, and has a draft attached, drawn by such shipper, and the carrier delivers the goods to such third person without requiring his surrender of the bill of lading properly indorsed, and without being ordered to do so by the shipper, the carrier becomes liable for the full value of the shipment. (p. 604.)

E. M. Thompson and R. H. Welch, for the appellant.

Barron & Ray, for the respondent.

252 POPE, C. J. This is an action by the plaintiff, a corporation under the laws of the state of New York, against the defendant, a corporation under the laws of Virginia, but domesticated in South Carolina, for the recovery of the sum of two hundred and thirty dollars and fifty-seven cents. The contest grew out of a motor of the value of two hundred and thirty dollars and fifty-seven cents, transported from Schenectady, New York, to Columbia, South Carolina. The bill of lading was to the order of the General Electric Company, notify Cotton States Electric and Machine Company. This bill of lading, together with a draft attached thereto, was drawn by the General Electric Company upon the Cotton States Electric and Machine Company—the draft was for seventy-seven dollars and twenty-three cents, and was received at the Carolina National Bank at Columbia, South Carolina, for collection, June 29, 1903, and was held by said bank until July 13, 1903, when it and the bill of lading to which it was attached was returned by said bank to the General Electric Company—the plaintiff here.

On the 29th of September, 1903, the plaintiff, through 253 its attorneys, Barron & Ray, presenting the bill of lading to the defendant, demanded the motor in question; but the defendant stated that it could not comply with such demand, because it had already delivered such property to the Cotton States Electric Machine Company without the delivery or presentation of the bill of lading—the latter promising afterward to deliver said bill of lading, which promise was never fulfilled. The defendant also tendered the sum of seventy-seven dollars and twenty-three cents to the plaintiff, which it claimed should be a full settlement betwixt them, but the plaintiff declined to receive it. The plaintiff thereupon brought this action, which came on for trial before Judge Purdy and a jury.

The plaintiff denied the defendant's right to introduce the contract between the plaintiff and the Cotton States Electric and Machine Company in regard to this motor. Upon objection, the judge refused to admit such contract in the testimony. The defendant also sought to introduce a declaration of one Laxton, as the agent of said plaintiff,

the only evidence of such agency being the alleged agent's declaration. The judge refused to admit such declaration of the alleged agent—there being no other testimony as to such agency but his own statement. There was also some controversy at the trial of the following part of the defendant's answer: "That on that day [meaning the 13th of July, 1903], the Cotton States Electric Machine Company called on this defendant's agent and deposited the amount of said draft with this defendant, and received said machinery. That said machinery was shipped to said Cotton States Electric Machine Company on a conditional sale, and said plaintiff intended that it should be delivered on the payment of the amount of said draft, and such delivery has caused no loss or damage to them, as their rights to the property are still good under the said conditional sale. That the only adjustment and payment of the claim presented by the plaintiff which defendant is required to make is to pay over to the plaintiff the said sum of seventy-seven dollars and twenty-three cents, which defendant then and there offered to do, which offer plaintiff refused."

254 After the charge of the judge to the jury, it found a verdict in favor of the plaintiff for two hundred and thirty dollars and fifty cents, and after entry thereon an appeal has been taken to this court.

The first ground of appeal relates to the striking from defendant's answer that clause which set up that on the 13th of July, 1903, the Cotton States Electric and Machine Company called on the defendant, depositing seventy-seven dollars and twenty-three cents, and received said machinery. All this is fully set forth in the extract we have already made.

The machinery when received by the defendant, and it well knowing that the same was subject to the bill of lading in the plaintiff's hands, could not be delivered with safety by the defendant to the Cotton States Electric and Machine Company. The character impressed by law is distinct and unvarying. Any effort to surrender a shipment at variance with the bill of lading is at the peril of the defendant. He must be prepared to pay the full value of the shipment or take upon himself the burden of proving himself justified in so doing. A case in our own books, to wit, National Bank v. Atlanta etc. Ry. Co., 25 S. C. 216, abundantly illustrates the character and legal effect of a bill of lading drawn to

order. At page 222 of that case, Mr. Justice McIver said: "That such a bill of lading, though not negotiable, in the fullest sense of that term like a bill of exchange, or to speak more accurately, although its negotiability is not attended with all of the consequences resulting from the negotiability of a bill of exchange, yet that it is negotiable in so far that by indorsement the right to the possession of the goods mentioned in it passes, is well settled by repeated adjudications of courts of the highest authority and is generally, if not universally, conceded by the elementary writers: Conard v. Atlantic Ins. Co., 1 Pet. 386, 7 L. ed. 189; The Thames, 14 Wall. 98, 20 L. ed. 804; Dows v. National Exchange Bank, 91 U. S. 618, 23 L. ed. 214; Shaw v. Railroad Co., 101 U. S. 557, 25 L. ed. 892; and Heiskell v. Farmers' etc. National Bank, 89 Pa. St. 155, 33 Am. Rep. 745; McCants v. Wells, 4 S. C. 381."

Under these circumstances it was the duty of the defendant [255] to await the production of the bill of lading and let the indorsement thereon govern the delivery of the shipment. When it is remembered that the defendant received in cash only one-third of the value of the shipment, with no provision for the two-thirds credit portion, it will be very apparent why the case of Witt v. East Tennessee etc. R. Co., 8 Am. & Eng. R. R. Cas. N. S., 380, is not applicable to this case, for there the money was fully paid, while here two-thirds of the value of the shipment was unpaid and unprovided for.

We think the circuit judge made no mistake, and this first exception is, therefore, overruled.

2. We do not think the circuit judge erred in ruling that the contract made by and between the General Electric Company and the Cotton States Electric and Machine Company was irrelevant. When the latter refused to accept the papers transmitted to the Carolina National Bank, and those papers were returned by said bank to the plaintiff, there was an end to the purchaser's rights under the contract, and any proof of what those business relations were or might have been, had no connection with the plaintiff and defendant. The defendant was already advised that the plaintiff retained full control over such shipment through the bill of lading to plaintiff's order. This ground of appeal is overruled.

As to the third ground of appeal, relating as it does to the competency of the witness, Mr. Beck's, statement, that one Laxton was plaintiff's agent by Laxton's declaration alone, we see no error committed by the circuit judge. It is well-known law that a witness cannot establish his representative capacity by his own declaration alone, and as this is all the defendant offers here, it must fail. The third exception is overruled.

Fourth ground of appeal. It is claimed the court erred in charging the jury as follows: " 'If you find that motor or property in question was shipped under this bill of lading, then the Southern Railway, if the Southern Railway [256] received it, under that bill of lading, had no right, except upon the surrender of the bill of lading duly indorsed, to deliver the property, unless ordered by the plaintiff. The Southern Railway, defendant, if it connected itself with that bill of lading by receiving, agreeing to transport that property under it, or by receiving and transporting it under it, couldn't dispose of the property except on the order of the plaintiff in this case; and if it didn't have such order, and took the property and disposed of it, or failed to deliver it on the order, the company would make itself liable for its value'; because, under the facts of this case, the defendant was not liable for the amount of the first installment due for said motor, according to the terms of said contract, and as represented by the amount of the draft attached to the bill of lading; and because the defendant, under the facts of the case and the intention of the parties, did have the right to deliver the motor upon payment of the first installment, seventy-seven dollars and twenty-three cents, as provided in said contract, without the production of the bill of lading." Under the cases already cited herein, the defendant, if liable at all, is liable for the full value of the shipment, and as the property shipped was proved to be worth two hundred and thirty dollars, the charge of the judge was right. This ground of appeal is, therefore, overruled.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

For Authorities bearing upon the decision in the principal case, see National Newark Banking Co. v. Delaware etc. R. R. Co., 70 N. J. L. 774, 103 Am. St. Rep. 825, and cases cited in the cross-reference note thereto.

HUNTER v. ATLANTIC COAST LINE RAILROAD COMPANY.

[72 S. C. 336, 51 S. E. 860.]

NEGLIGENCE, CONTRIBUTORY—Injury to Railroad Passenger.—A passenger on a railroad train at night who passes from one car to another, and by the trainmen, in search of drinking water, and who, in so doing, steps off the platform of the rear car while thinking that he is going into another car, cannot recover for injury thus received, as the proximate cause thereof is his own contributory negligence, although there is no light or guard chain on the platform of such rear car. (pp. 607, 608.)

A. Levi and C. W. Davis, for the appellant.

J. T. Barron and Wilson, DuRant & Muldrow, for the respondent.

337 WOODS, J. The defendant demurred to the complaint in this case on the ground that it failed to state facts sufficient to constitute a cause of action, in that: "1. The allegations of fact in the complaint do not show any actionable negligence; 2. The allegations of the complaint show contributory negligence on the part of the plaintiff; 3. The complaint shows that the gross negligence of the plaintiff in wrongfully going upon an alleged dangerous and improperly lighted platform was the direct and proximate cause of the injury to plaintiff."

The demurrer was sustained, and the plaintiff appeals, relying on the following allegations of the complaint, as stating a good cause of action: "2. That on or about the eighteenth day of August, 1903, the defendant received the plaintiff into one of its railroad trains 338 running between the places hereinafter mentioned, and then and there undertook and agreed to safely carry and convey him therein as a passenger, from Manning, South Carolina, to Savannah, Georgia, and return, for two dollars, paid by plaintiff to one E. W. Dines, who was a manager of an excursion from Sumter, South Carolina, to Savannah, Georgia, and return, said train being in charge of, and under the control of, the servants and employés of the defendant.

"3. That the train on which the plaintiff was riding as a passenger under said contract to safely transport him was in an insecure, dangerous and unsafe condition, in that there

was no chain or guard-rail on the rear platform of the last car of said train, where passengers walk in passing from one car to another, and there was only a very dim light in said car and none upon the rear of said car.

"4. That at the time of the injury hereinafter referred to, the train of defendant was at some point on its line between Santee river and Ashley junction, and the conductor and porter of said train were sitting near the rear of the last car of said train, and in a position where they could see plaintiff as he approached the rear of said car, and they did not warn him of the dangerous condition of the rear platform of said car.

"5. That it was the duty of the defendant to provide its cars with drinking water for its passengers, and to keep them so provided, but it negligently failed so to do, and this plaintiff becoming thirsty after eating a lunch provided by the defendant in one of its cars near the front of its said train, sought a drink in all of its cars, going back toward the rear of the train and finding none up to and in what plaintiff afterward learned was the last car of the train, he attempted to pass on to what he believed was a car in the rear of this car, when, because of the carelessness and gross negligence of the defendants, its servants and employés, in failing to properly light its said car and rear platform, and to warn plaintiff of the dangerous condition of the rear platform, and to provide the said chain or guard-rail, as it was [339] duty bound to do, the plaintiff walked off the rear of said car and was violently hurled to and precipitated upon the cross-ties, iron rails and track of defendant, breaking both of his arms, one of his legs in two places, and the knee-cap of the other leg in three places."

We extract from the argument of appellant's counsel the six particulars in which it is charged the defendant was negligent: "1. A failure to provide drinking water for this passenger; 2. An improperly lighted car; 3. No lights on rear platform; 4. A failure to provide a chain or guard-rail on rear platform; 5. A failure to warn plaintiff of dangerous condition of rear platform, although conductor and porter were sitting where they could see actions of plaintiff, and in a few feet of the danger he was going into; 6. Negligent and wanton conduct in leaving plaintiff upon track after being notified of his accident by friends."

It is the duty of a railroad company to provide drinking water for passengers, and it cannot be said it would be negligence under ordinary circumstances for a passenger to go from one coach to another, if necessary, in search of water. It is also the duty of a railroad company to provide safe platforms as a means of ingress and egress from its passenger cars. Passengers already on the cars are not invited or expected, however, to use the rear platform of a train while it is in motion, and it is not the duty of railroad officials to request persons apparently in their senses not to take the risk of doing so. As was said in Jarrell v. Charleston etc. Ry. Co., 58 S. C. 491, 494, 36 S. E. 910: "The train was not at any station or place where persons are invited to use the platform as a means of entering or leaving the car, when as to such persons the defendant would owe the duty to so light the platform and landing as to insure safety in their use. Under the circumstances in this case, the defendant owed no duty to plaintiff to light up the platform and adjacencies outside the car for his benefit." Plaintiff, having the notion that there was another car in rear of the one he was in, walked out into the dark and off the platform. There was no pretense that the [340] defendant did any positive act tending to delude the plaintiff into supposing there was still another car behind that from which he fell. On the contrary, his failure to see in front of him any car or any light in a car was express notice to the plaintiff that he had reached the end of the train; and when in the face of the warning of the absolute darkness which met him at the car door, the plaintiff went on, he recklessly and blindly took his life into his own hands. We do not see how the dim lights in the car could be regarded a proximate cause of the fall. If they had been brighter they might have made the absence of any car in the rear still more manifest, but without this aid the darkness was sufficient warning to stop any reasonable man. The proximate cause of the injury plainly was the plaintiff's own want of care.

The complaint not showing that the injury was caused by any act of omission or commission of the servants of the railroad company, or from any defects in the instrumentalities of transportation, there is no presumption of negligence on the part of the defendant: Steele v. Southern Ry. Co., 55 S. C. 389, 74 Am. St. Rep. 756, 33 S. E. 509. But if such

presumption existed, it is completely rebutted by the allegations of the complaint which show the injury was due to plaintiff's own recklessness or negligence.

Assuming however, for argument's sake, that the defendant was guilty of breach of duty to the plaintiff in all the particulars set out in the complaint, it is manifest the injury would not have been received but for the negligence of the plaintiff in endeavoring to step from one car into another without having any reason to believe there was another car. The plaintiff thus shows that his own negligence, at least, contributed to the injury as a proximate cause.

The sixth paragraph of the complaint, alleging breach of duty by the conductor in not backing the train and endeavoring to find plaintiff when he was missed, was not considered by the circuit judge, and has not been brought before this court by the exceptions.

The judgment of the court is, that the judgment of the circuit court be affirmed.

If a Passenger on a vestibuled train undertakes to enter a closet, and the train is plunged into darkness by entering a tunnel, and he enters a door, which he supposes leads to the closet but which opens out of the vestibule, and is thrown out and injured, he is chargeable with contributory negligence, precluding a recovery of damages from the railway company: Piper v. New York etc. R. R. Co., 156 N. Y. 224, 66 Am. St. Rep. 560. A passenger on a vestibule train, the vestibule doors of which are open, is not guilty of contributory negligence in passing from one car to another, unless he knows, or should know, that such doors are open: Robinson v. United States Benevolent Soc., 132 Mich. 695, 102 Am. St. Rep. 436.

FRIERSON v. JENKINS.

[72 S. C. 341, 51 S. E. 862.]

RES JUDICATA—Judgment in Criminal Action.—A judgment of acquittal of an alleged husband on a trial for bigamy in having married the plaintiff in a civil suit to establish dower, is not res judicata as to plaintiff's right to recover. (p. 609.)

RES JUDICATA.—Judgment in criminal proceedings does not support the plea of res judicata in a civil action. (p. 609.)

McLauchlin & Herndon, for the appellant.

A. B. Stuckey, for the respondent.

341 WOODS, J. In this action for dower the plaintiff claims to be the widow of Richard Frierson, who was the

owner of the land described in the complaint. The defendant, Mary Frierson, alleges in her answer that she and not the plaintiff was the lawful wife of Richard Frierson, and that her daughter, the infant defendant, Katie Frierson, was born of her marriage with him; that Frierson left a will in force, that she and her child are entitled to all his property [342] as his devisees and only heirs. The circuit judge, on motion, struck out the following, constituting the third paragraph of the answer as irrelevant: "That during the year 1903, at the June term of the court of general sessions, the plaintiff herein prosecuted Richard Frierson for bigamy in the criminal courts of Lee county, alleging and claiming that Richard Frierson, as her lawful husband, had intermarried with this defendant, Mary Frierson; that after a fair trial before an intelligent white jury of Lee county, the said Richard Frierson, admitting his marriage with this defendant, Mary Frierson, and denying any marriage with the plaintiff, Eliza Frierson, was acquitted, thus making the question, 'Who was his lawful wife,' res adjudicata, which is herein and hereby pleaded as an absolute bar to the plaintiff's right of recovery."

On the same ground, the corresponding paragraph in the answer of the defendant Nathan Barnett, who claimed to be a mortgagee and executor of the will of Richard Frierson, was also struck out. The defendants appeal.

It is well established that a judgment in a criminal proceeding does not support the plea of res judicata in a civil action The reason is thus clearly stated in 2 Black on Judgments, section 529: "Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings and the rules of evidence which apply to them respectively are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact": Van Fleet on Former Adjudication, sec. 485 et seq.; 24 Am. & Eng. Ency. of Law, 831; Wharton on Evidence, sec. 777.

The judgment of this court is that the judgment of the circuit court be affirmed.

The Doctrine of the Principal Case will be found discussed in the monographic note to Mitchell v. State, 103 Am. St. Rep. 19-29.

BOTTUM v. CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY.

[72 S. C. 375, 51 S. E. 985.]

CARRIERS—Loss of Freight—Damages.—If a box of pictures is shipped, marked and billed as glass, in the absence of actual fraud, the carrier is liable, in case of loss, only for the value of a box of glass. (p. 612.)

CARRIERS—Marks on Freight.—If pictures are shipped in a box marked "glass," the carrier is not required to inquire into the nature and value of the contents of the box. (p. 612.)

CARRIERS—Contents of Packages.—A common carrier has a clear right to know the contents of packages offered for shipment in order that he may fix his compensation and know his risk, and the statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely, and if the value or character of the article shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier, or the risk of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. (p. 613.)

CARRIERS—Loss of Freight—Evidence.—If it is sought to recover from a common carrier for the loss of a box of goods, evidence of the nature of its contents is admissible. (p. 614.)

S. J. Simpson and M. F. Ansel, for the appellant.

W. G. Sirrine, for the respondent.

376 WOODS, J. On May 16, 1903, the plaintiff, Mrs. Bertha C. Bottum, had a lot of her household goods packed by H. B. Graves, a large dealer in furniture and pictures, and shipped by him from Rochester, New York, to Greenwood, South Carolina. One box containing a pastel portrait of Mrs. Bottum's deceased husband and a valuable landscape painting was lost on defendant's road, and this action was brought to recover the value, three hundred and seventy-seven dollars and fifty cents. Mrs. Bottum's agent, in making the shipment, marked the box containing these pictures "glass, with care." The bill of lading was for "household goods," but the kind of goods in each package, except "three trunks crated," was specified. The box of pictures was included in the description, "3 box glass," the other two boxes really containing glass. The defendant's freight charge on glass was one and one-half times first class. On pictures the charge was three times first class, the value being over fifty dollars and not exceeding

two hundred dollars, and a special contract was required when the value was over two hundred dollars. These rates and requirements, it seems, had been approved by the Interstate Commerce Commission. [377] The packers testified they had always received from consignors pictures marked as glass, and always so marked them in shipping, but there was no evidence that the defendant or any other railroad ever acquiesced in this misdescription. The defendant denied liability for the value of pictures shipped in a box represented by the marks on the box as glass, for which it charged and received a lower rate of freight.

The circuit judge charged: "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box. Now if Mrs. Bottum was not guilty of any improper concealment of the contents of the box shipped, or the value thereof, it was the right and duty of the railroad company to inquire about the nature and value of the contents of the box; and if it failed to do so, and the box has been lost, then the railroad company is liable for the full amount of the loss."

In accordance with this instruction, the verdict was in favor of the plaintiff for the value of the pictures. There are a number of exceptions, but the case turns on the soundness of the proposition just quoted from the charge. It is manifest from the context that when the circuit judge said, "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box," he meant there was no intention to defraud by concealment, for the defendant's claim of exemption rested entirely on the ground that it had been deceived as to the contents of the box by the untrue representation of the plaintiff's agent as to a fact recognized by the law as of great importance to the contract of carriage. More definitely, then, the question at issue is, Was the circuit judge right in charging as a matter of law, that in the absence of actual, intentional fraud, the carrier was liable for the value of pictures marked "glass" on the box and billed as "glass," because it was the duty of the railroad company to make further inquiry about the nature of the contents, and having failed to do so, it could not avail itself of the misdescription? [378] It is quite true that when a railroad company receives a package marked "glass," and makes no inquiry as to its kind or value, it is responsible for any article re-

ceived coming under the general description of glass, but by no possible stretch could a pastel portrait or landscape painting be classed as glass. They may, in this instance, have glass over them, but the glass cover, like the frame, is incidental, and usually of insignificant value compared to the picture. In marking the box, the shipper expressly represented the box to contain glass, and it was, therefore, not the duty of the carrier to ask for a repetition of the statement, nor to disbelieve it and open the box to see for itself.

It is known to all that for purposes of transportation, goods are classified, and that several factors enter into the consideration, such as weight, bulk, value, and the risk of loss or injury. The carrier has a clear right to know the contents of packages offered for shipment, in order that he may fix his compensation and know his risk. The statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely, and if the value or character of the article actually shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier or the risk or expense of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. This is merely the application of the familiar principle that a party to a contract is held only to that liability which falls fairly within the terms of the contract, and it makes no difference if an item which the other party wished to cover was omitted by his fraud or by his negligence.

It is said in Hutchinson on Carriers, section 213: "Fraud may be effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of the contents, if there be anything in its form, dimensions [379] or other outward appearance which is calculated to throw the carrier off his guard, whether so designated or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or

no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value": 6 Cyc. 380; 2 Kent's Commentaries, *603; Angell on Carriers, sec. 261; 5 Am. & Eng. Ency. of Law, 345; Relf v. Rapp, 3 Watts & S. 21, 37 Am. Dec. 528; Orange County Bank v. Brown, 9 Wend. 85, 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. 459; Dunlap v. International Steamboat Co., 98 Mass. 371; Shackt v. Illinois Cent. R. Co., 94 Tenn. 658, 30 S. W. 742; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711, 37 L. ed. 587; Southern Express Co. v. Everett, 37 Ga. 688; Everett v. Southern Exp. Co., 46 Ga. 303; Chicago etc. R. R. Co. v. Thompson, 19 Ill. 578; Chicago etc. R. R. Co. v. Shea, 66 Ill. 471; Savannah etc. Ry. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416; Charleston etc. Ry. Co. v. Moore, 80 Ga. 522, 5 S. E. 769. These authorities, especially the leading case of Relf v. Rapp, 3 Watts & S. 21, 37 Am. Dec. 528, are opposed to the instruction given by the circuit judge, to the effect that marking and billing the box "glass" was not a representation that its contents were to be classed as glass and not as pictures.

The case of Rathbone v. New York etc. R. R. Co., 140 N. Y. 48, 35 N. E. 418, relied on by respondent, is not applicable. There the bill of lading simply described the property as two boxes of marble, contents and value unknown, and contained a stipulation to the effect that no statuary would be carried by defendant for the loss of which it would be liable, unless a memorandum was delivered, stating the character and kind of articles and their value, unless a proper extra price for the carriage and responsibility was paid. Shippers' agents informed defendant at the time of the shipment that [380] the box contained marble statuary, and this was marked upon the box, also the words, "Handle with care." The statuary was found to be broken on delivery to the consignee, and it was held: "a nonsuit was error; that if defendant was fully and truly informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observance of the conditions; and that plaintiff was entitled to a submission to the jury of the questions of waiver, of fraudulent concealment and of de-

fendant's negligence." There was, therefore, actual notice to the carrier of the contents of the box, which, as the court held, was obviously evidence of waiver of the conditions of the bill of lading. Here we perceive nothing to put the carrier on notice that the mark on the box did not truly state the nature of the contents, but even if there was such evidence, it was the right of the defendant to have the question of waiver submitted to the jury.

The defendant offered evidence tending to show that the misrepresentation as to the contents of the package materially affected the burden and the consideration of the contract of carriage, and no evidence to the contrary was offered by the plaintiff. On principle supported by the authorities above cited, the plaintiff was entitled under the evidence offered to recover as for the loss of a package of glass used for household purposes, the reasonable value to be fixed by the jury, and it was, therefore, error for the circuit judge to charge, as in effect he did, that the verdict should be for the plaintiff for the value of the pictures.

There was no error in admitting testimony as to the contents of the box; without it the case could not be intelligibly tried.

The judgment of this court is, that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

The chief justice did not participate in this opinion because of illness.

The Effect on the Liability of a Carrier of the failure of a shipper to disclose the true value or character of the goods shipped is discussed in Hayes v. Wells, Fargo & Co., 23 Cal. 185, 83 Am. Dec. 89; Savannah etc. Ry. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87; Galt v. Adams Exp. Co., McArt. & M. 124, 48 Am. Rep. 742; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Relf v. Rapp, 3 Watts & S. 21, 37 Am. Dec. 528; Graves v. Lake Shore etc. R. R. Co., 137 Mass. 33, 50 Am. Rep. 282.

EQUITABLE BUILDING AND LOAN ASSOCIATION v. CORLEY

[72 S. C. 404, 52 S. E. 48.]

BUILDING AND LOAN ASSOCIATIONS—Foreign Loan Contract—Construction.—If a loan is made to a member of a foreign building and loan association, and the bond executed provides that the obligation is a contract made in another state and governed by the laws of that state, it must be construed, as to the application of payments, in accordance with the laws of that state. (pp. 616, 617.)

MORTGAGES—Purchaser—Notice.—If a mortgage on land securing a bond refers to such bond for conditions, and the bond is not recorded, the bond and mortgage are not notice to a purchaser of the land subject thereto of any other conditions than those appearing on the record of the mortgage. (p. 618.)

MORTGAGES—Purchaser—Notice.—If a purchaser of land covered by a mortgage has actual notice of the conditions of the mortgage, though such conditions appear only in a bond secured by it, and not recorded, he is bound by such notice. (p. 618.)

Efird & Dreher, for the appellants.

R. W. Shand, for the respondent.

405 WOODS, J. The Equitable Building and Loan Association, a corporation having its principal place of business in Augusta, Georgia, brings this action to foreclose a mortgage on land in Lexington county, South Carolina, executed by the defendant Corley, a resident of South Carolina. The land was afterward conveyed by Corley to Roof and Barre, and by them to the defendant Roof and Barre Lumber Company. The answer sets up the plea of payment. The first question arising under this plea is, whether all sums paid to the Equitable Building and Loan Association by Corley and his grantees, after Corley made the mortgage and borrowed the money, should be credited on the sum borrowed and interest, 406 or should be applied not only to that, but also to the expenses of the association and premiums, as provided by the bond.

We first consider this question as it affects the rights of Corley, the original mortgagee. If the contract is governed by the law of this state, as defendants contend, the former method of computation would be correct, and the bond and mortgage would be overpaid: Interstate Bldg. Assn. v. Holland, 65 S. C. 448, 43 S. E. 978. The circuit judge, however, held the contract fell under the law of Georgia, and

that by that law the bond was to be computed according to its terms, which included not only the sum actually borrowed, with interest, but the expenses and premiums for which Corley was liable as a borrowing member of the association. The following is the statute of Georgia under which the computation in the circuit decree was made: "Be it further enacted, That no fines, interest or premiums paid on loans in any building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state, and according to the terms and stipulations of the agreement between the association and the borrower:" Ga. Laws 1890-91, vol. 1, pp. 176-181, sec. 8. This statute was construed by the supreme court of Georgia, in Cook v. Equitable Bldg. etc. Assn., 104 Ga. 814, 30 S. E. 911, and Burns v. Equitable Bldg. etc. Assn., 108 Ga. 181, 33 S. E. 856. If the Georgia statute governs the contract, it is obvious from its terms, as construed by the supreme court of Georgia, that there was no error in the decree of the circuit court.

The complaint alleges "that at Augusta, in Georgia, on August 3, 1895, the plaintiff advanced to the defendant, Patrick H. Corley, on four shares of the stock of this plaintiff, held by him, the sum of four hundred dollars, and in consideration thereof the said Patrick H. Corley made, executed and delivered to plaintiff his bond, dated August 3, 1895, in the penal sum of eight hundred dollars." The pleadings and the bond and mortgage are silent as to the place of payment. The law of the place where the contract [407] is made governs as to its construction and the obligations which arise from it where it does not provide for the application of the law of a different place, and makes no mention of the place of payment: 9 Cyc. 668; Touro v. Cassin, 1 Nott. & McC. 173, 9 Am. Dec. 680; Pegram v. Williams, 4 Rich. 219. Here it is not only admitted the contract was made in Georgia, but also that by the bond the parties expressly contracted, "that this obligation is a Georgia contract, and in all respects subject to and governed by the laws of Georgia." The law applicable to such an agreement is so well and accurately stated by Scates, C. J., in McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651, 654, that we quote at some length from his opinion, though it would be sufficient to refer to our own cases of Thornton v. Dean, 19 S. C. 583, Equitable Bldg. etc. Assn. v. Hoff-

man, 50 S. C. 303, 27 S. E. 692, and Columbian Bldg. etc. Assn. v. Rice, 68 S. C. 236, 47 S. E. 63: "The contracts were made in this state, and the laws of this state would, had the parties been silent, have become part of the contracts for the construction and meaning of the parties, in ascertaining and fixing their mutual rights and obligations. But parties may substitute the laws of another place and country than that where the contract is entered into, both in relation to the legality and extent of the original obligation and in relation to the respective rights of the parties for a breach or violation of its terms. This I call a substitution of the laws of another place or government for those of the place of entering into the contract, and which is noted by the authorities as an exception to the general rule. This is allowed in all civilized countries, and recognized as part of the jus gentium, or law of nations, respecting private and personal rights, and in all cases where the subject matter of the contract is not malum in se, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular community in which it is sought to be enforced. When parties seek to enforce such obligations in the courts of the country whose laws have been adopted as those of the contract, it presents only an ordinary case of jurisdiction to the court over a contract [408] made under the same laws of the forum, and by parties within its jurisdiction. But when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of that contract, the law governing it has no force or obligation ex proprio vigore in that forum, but ex comitate, under the general public law, the court will enforce it, giving extraterritorial effect to the laws of another government where it is not dangerous, inconvenient, immoral, nor contrary to the public policy of the local government. Where the legislature does not define and prescribe the extent of this comity, it must be declared by the courts in each case, governed by precedents, under the general public law": 9 Cyc. 665, 666. We conclude the contract was governed by the law of Georgia, and as to Corley the computation was correctly made.

The serious question remains whether the plaintiff can foreclose the mortgage on the land in the hands of the Roof and Barre Lumber Company, a subsequent purchaser, for more than a debt of four hundred dollars and interest,

less the payments made. The bond contemplates that Corley should remain a member of the association after he became a borrower, with the obligation of a member to pay one dollar and twenty cents per month on each share of his stock until the series to which his certificate belonged should mature—maturity being the date when these payments would aggregate enough, after taking out expenses and premiums, to liquidate the principal of the debt of four hundred dollars. It contemplates further that he should pay in addition each month interest on the four hundred dollars at the rate of six per cent per annum until the stock should mature, and that his four shares of stock should be assigned to the association as collateral for the obligations of the bond. Upon these payments being kept up until the maturity of the series, the bond stipulated that the obligation would be at an end. The mortgage contains none of these provisions as to the payment of stock, but merely recites that it is given to secure the payment of a bond in the penal sum of eight hundred dollars, conditioned for the payment of four hundred dollars, "as in and by the said bond and conditions thereof, [409] reference being thereunto had, will more fully appear." There is nothing whatever in the record of the mortgage to indicate or to put a purchaser of the land on notice that Corley was a member of the association or anything more than an ordinary debtor; for we do not think the fact that it was given to a building and loan association and no date of maturity specified, could be regarded sufficient for that purpose. If, therefore, there were nothing beyond the record of the mortgage to show notice of the terms of the bond, the principles of Building etc. Assn. v. McCartha, 43 S. C. 72, 20 S. E. 807, would be applicable, and the defendant, Roof and Barre Lumber Company, would not be chargeable with notice of anything beyond an ordinary debt of four hundred dollars secured by the mortgage. We find, however, that Roof and Barre Lumber Company answered the complaint not separately but jointly with Corley, and the answer, while admitting the execution of the bond and mortgage by Corley, says nothing of a want of notice of the terms of the bond set out fully in the complaint. But what is still more significant, Roof and Barre and Roof and Barre Lumber Company continued to pay each month after the purchase, for sixty-four months, the sum of six dollars and eighty cents, which was

precisely the amount called for each month by the bond, and which, before the sale of the land, had been paid by Corley. There is no evidence that there was any demand made by the mortgagee for these payments, and it is a fair inference that these parties bought the land with knowledge of the character of the debt represented by the bond which the mortgage secured, and undertook to pay it. They never have indicated, however, in any way that they knew of the provision for the collection of attorney's fees, and the circuit judge correctly held these fees could not be collected from the land.

The judgment of this court is, that the judgment of the circuit court be affirmed.

The chief justice did not participate in this opinion because of illness.

The Construction and Legal Effect of a Contract are governed by the lex loci contractus, unless there is something indicating a different intention of the parties: Mittenthal v. Mascagni, 183 Mass. 19, 97 Am. St. Rep. 404; Union Nat. Bank v. Chapman, 169 N. Y. 538, 88 Am. St. Rep. 614. Contracts are governed by the law of the place where made, unless a different place is fixed for their performance: Fidelity Mut. Ins. Assn. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813. That the validity and effect of a contract are determined by the law of the place of performance, see Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 98, 99 Am. St. Rep. 549, and cases cited in the cross-reference notes thereto.

When Parties to a Contract Reside in Different States, they may choose, and express their choice by an express stipulation, that their contract shall be governed by the law of one of the states rather than that of the other: See the monographic note to McGarry v. Nicklin, 55 Am. St. Rep. 53; Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715.

MILHOUS v. SOUTHERN RAILWAY.

[72 S. C. 442, 52 S. E. 41.]

PLEADINGS—Objection to Evidence.—In the absence of a motion by defendant to strike out certain allegations in a complaint, he cannot object to evidence in support of them. (p. 625.)

CARRIERS—Duty to Stop at Flag Stations.—A statute providing that trains shall stop at advertised stations for the accommodation of passengers does not apply to flag stations not advertised. (p. 626.)

CARRIERS—Flag Stations—Refusal to Stop—Damages.—If an engineer upon a railroad train willfully passes a flag station without stopping, seeing a person intending to become a passenger standing there, the latter is entitled to recover punitive damages of the railroad company. (p. 626.)

TRIAL—Instructions.—A request for an instruction, already covered by an instruction given, is properly denied. (p. 626.)

CARRIERS—Failure to Stop at Flag Station—Damages.—In estimating damages for the failure of a railroad train to stop at a flag station for a person intending to become a passenger, his inconvenience, which is the direct result of the negligence of the trainmen, may be considered in estimating the damages. (p. 626.)

CARRIERS—Refusal to Stop at Flag Station.—If a complaint alleges that a conductor on a railroad train was acting within the scope of his authority when he refused or failed to stop the train at a flag station, a request to charge that such conductor was not called upon to look out for signals of intending passengers is properly refused as inapplicable. (p. 626.)

The defendant's exceptions were as follows:

"1. Because his honor erred in allowing the plaintiff to testify that his feelings were hurt and that he was subjected to inconvenience; upon the ground that the same were not elements of damage in this case.

"2. Because his honor, the presiding judge, erred in charging the jury as follows: 'You have heard the testimony in this case, and you must determine the question whether or not he was a passenger on that occasion. If he was, he was entitled to the rights of a passenger, he was entitled to board the train with his ticket, and to be transported with safety and convenience to the point of his destination. I say that was his contract, that is what the railroad had undertaken to do, and that is what the railroad company was bound to do, in my opinion, under that state of facts.' The error being, that under the testimony Perry was a flag station for train No. 30, which the plaintiff desired to board, and it was necessary that it be

flagged, and it was not required to stop for plaintiff without being flagged, even though plaintiff held a ticket.

"3. Because his honor erred in reading to the jury section 2134 of Code of Laws of South Carolina of 1902, to wit: 'Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station, advertised by such company as a station for receiving passengers upon such trains, for a time sufficient to receive and let off passengers.' And in charging the jury as follows: 'Now, a request to charge from the defendant is that that does not apply to flag stations, but I charge you that it does. It applies to every advertised station, and if they advertise this as a flag station, and passengers are to get on and off at that point, why the train was bound to stop and receive those passengers, and it was bound to stop long enough for them to get on and off, notwithstanding it may not be a regular station on the line of their road.' The error being that said section of the code does not apply to flag stations at all or to trains which stop only on flag. Further, the evidence showing that Perry was a flag stop for the train in question (No. 30), this charge required the train to be stopped there, whether flagged or not, which is contrary to law and to said section of the code.

"4. Because his honor erred in charging the jury, at plaintiff's request, as follows: 'When a passenger purchases a ticket from the agent of a railroad company at a station where tickets are sold, he is entitled to passage on the train of cars for passage on which the ticket was purchased to his destination. And it is the duty of the railroad company to stop its train at such station long enough for said passenger with such ticket to get aboard for the purpose of traveling thereon to his destination.' Such charge being inapplicable to this case, erroneous and to defendant's prejudice. It is submitted that Perry being a flag stop for the train in question, the defendant was not required to stop for plaintiff unless such train was flagged.

"5. Because his honor erred in charging the jury, at plaintiff's request, as follows: 'That it is the duty of the employés of the company, its agents and servants on its train, to keep a lookout at its stations where tickets are sold along its route; and any such train for riding on which tickets have been sold will fail to stop for such passenger at

its peril, as failure to stop is negligence in the law, which will entitle such passenger to such damages as he may prove by the preponderance of the testimony under the allegations of his complaint against the negligent company, defendant.' 1. Such charge was erroneous in that it did not declare the law with reference to the stopping of trains at flag stations where the train is required to be flagged before it will stop; 2. It exacted more than the law required, and held defendant to the duty of keeping a lookout and stopping its trains at flag stations whether properly flagged or not; 3. It was further erroneous in declaring that a failure to stop is negligence in the law which will entitle the passenger to damages; whereas, on the contrary, it is incumbent upon the plaintiff to prove negligence on the part of the railroad company in failing to stop at a flag station after the train has been properly flagged.

"6. Because his honor erred in failing to charge defendant's second request to charge, which was as follows: 'It is only when it is shown that an engineer actually saw an intending passenger, or there is sufficient evidence to authorize a jury to find that the engineer saw him, that there can be such a willful disregard of the plaintiff's right, or such personal indignity to him, in rolling by without stopping, as would entitle the plaintiff to recover punitive damages.' The same being a correct proposition of law and applicable to this case.

"7. Because his honor erred in failing to charge defendant's third request to charge, which was as follows: 'The burden is upon the plaintiff to establish the allegations of his complaint by the preponderance of the evidence, and unless the jury is satisfied therefrom that the engineer of the train in question actually saw the signal to stop and willfully disregarded it, the plaintiff is not entitled to any exemplary damages in this case.' The same being a correct proposition of law and applicable to this case.

"8. Because his honor erred in failing to charge defendant's fourth request to charge, which was as follows: 'If the engineer, with reasonable care, ought to have seen but did not see the signal to stop, if such was given, this would present a case of only ordinary negligence, and in such case plaintiff would not be entitled to any exemplary damages.' The same being a correct proposition of law and applicable to this case.

"9. Because his honor erred in failing to charge defendant's fifth request to charge, which was as follows: 'Damages for the mere failure of a carrier to stop its train on signal at a flag station consists in compensation for the actual loss sustained by the intending passenger. This will include the actual loss sustained as the direct consequence of the carrier's failure to stop the train.' The same being a correct proposition of law and applicable to this case.

"10. Because his honor erred in failing to charge defendant's sixth request to charge, which was as follows: 'If you find from the evidence in this case, if there be such evidence, that the engineer of the train in question, in the exercise of reasonable care, failed to see the signal to stop at the flag station of Perry on the morning in question, if such signal was given, or that it was mere negligence on the part of said engineer in not seeing such signal, if it was given, then your verdict, if you find for the plaintiff, can only be for the actual damages sustained by the plaintiff, which actual damages must be the direct and necessary consequence of the failure to stop the train.' The same being a correct proposition of law and applicable to this case.

"11. Because his honor erred in failing to charge defendant's seventh request to charge, which was as follows: 'Mere inconvenience is not a ground of damages in an action against a carrier for failure to stop its train on signal at a flag station.' The same being a correct proposition of law and applicable to this case.

"12. Because his honor erred in failing to charge defendant's eighth request to charge, which was as follows: 'Plaintiff in this case is not entitled to any damages for inconvenience, pain or annoyance.' The same being a correct proposition of law and applicable to this case.

"13. Because his honor erred in failing to charge defendant's ninth request to charge, which was as follows: 'Section 2134 of the Code of South Carolina of 1902 does not apply to what are known as flag stations, but only to what are known as regular stations where the train is advertised to stop regularly.' The same being a correct proposition of law, and applicable to this case.

"14. Because his honor erred in failing to charge defendant's tenth request to charge, which was as follows: 'The conductor of a railroad train is not called upon to look out

for signals to stop or for intending passengers at flag stations. That is the duty of the engineer.' The same being a correct proposition of law and applicable to this case."

E. M. Thomson, for the appellant.

A. Crawford and G. T. Graham, for the respondent.

447 GARY, J. This is an action for damages, which the plaintiff claims he sustained, by reason of facts set out in the complaint, which alleges:

"That on the morning of the eighth day of February, 1904, between 4 and 5 o'clock, the plaintiff, who had arranged to go to Columbia, South Carolina, on the morning of the said eighth day of February, 1904, to consult with Dr. Taylor, who was to examine and treat plaintiff for an injury to his side, from which injury he was suffering, and having purchased a ticket from Perry station, on said railroad, to Columbia, South Carolina, from the station agent of the defendant at Perry, and paid the station agent the fare usually demanded and paid for a ticket from Perry to Columbia, and as defendant's passenger train from Savannah to Columbia was then due at Perry, the plaintiff, in company with said station agent and others, walked out to defendant's railroad tracks at a point where 448 the defendant's railroad trains always stop, for the purpose of allowing its passengers to get off and on its trains, and when the defendant's passenger train from Savannah to Columbia came in sight, the said station agent directed one Martin N. Price to signal the train, and the said Price having given the signal pursuant to the direction of the said station agent, the said train slacked up the speed at which it was running and slowed up to about six miles an hour, when the conductor of said train (who was the agent and servant of the defendant and acting within the scope of his authority as such), with a lantern in his hand came out of one of the cars of said train with the porter thereof to the lowest step of the platform of said car, whereupon the said station agent of the defendant called out to him, 'I have five passengers for you, or there are five passengers here for you'; that it was the duty of the defendant to stop said train at said Perry station long enough for plaintiff to get on board of it and carry him to Columbia aforesaid, but regardless of its duty in that respect and in utter disregard of the rights

of the plaintiff, the conductor of said train, who heard said station agent when he announced that said passengers were awaiting transportation, and who was the agent and servant of the defendant and acting within the scope of his authority as such, negligently, recklessly, wantonly and willfully failed and refused to stop said train for plaintiff to get on board thereof, and negligently, recklessly, wantonly and willfully caused the speed of the train to be increased and to move off rapidly toward the city of Columbia, so as to make it impossible for plaintiff to get on said train—thus leaving the plaintiff standing on the cold wet ground in the rain at Perry station.

"That by reason of the negligent, reckless, wanton and willful conduct of the defendant and its agents and servants in failing and refusing to stop said train at Perry station long enough for plaintiff to go on board of it, and in increasing the rate of speed of said train when it was informed that passengers were at said station for the purpose of boarding [449] said train, and as a direct result thereof, plaintiff was insulted, his feelings injured, he was compelled to remain at said Perry station several hours in the cold rain before he could board another train for Columbia; he was greatly annoyed, delayed and inconvenienced in reaching Columbia, was delayed from twenty-four to thirty-six hours in Columbia, during all which time he suffered much pain, annoyance and inconvenience, and was subjected to considerable pecuniary loss and expense, and was greatly inconvenienced and delayed in getting back to his home, and was otherwise greatly injured, to his damage two thousand dollars."

The answer of the defendant was a general denial. The jury rendered a verdict in favor of the plaintiff for five hundred dollars. The defendant appealed upon exceptions which will be incorporated in the report of the case.

First exception: As the testimony was responsive to the allegations of the complaint, the defendant is not in a position to raise the objection that it was inadmissible, after failing to make a motion to strike out the said allegations: Martin v. Seaboard etc. Ry. Co., 70 S. C. 8, 48 S. E. 616.

Second, third, fourth, fifth and thirteenth exceptions: Section 2134 of the Code of Laws is as follows: "Every railroad company in this state shall cause its trains of cars for

passengers to entirely stop upon each arrival at a station, advertised by such company as a station for receiving passengers upon such trains, for a time sufficient to receive and let off passengers." At the time mentioned in the complaint, Perry was a flag station for the train upon which the plaintiff expected to become a passenger. He had seen a regular time-table, advertising the fact that it was a flag station for said train, and his own testimony is to the effect that he had full knowledge of such fact. There is no testimony showing that the regulation making Perry a flag station for said train was unreasonable or oppressive; and as the company did not advertise Perry as a station for receiving passengers on the train in question, we do not [450] think that the plaintiff, under these circumstances, had the right to invoke the provisions of said section. The defendant was only bound to stop its train at such a station when duly flagged.

Sixth, seventh and eighth exceptions: The failure of an engineer to see a passenger may not only be the result of negligence, but likewise of willfulness. If he should intentionally fail to see a passenger, punitive damages would be recoverable.

Ninth and tenth exceptions: While the requests were refused, the propositions therein stated were substantially charged by the presiding judge.

Eleventh and twelfth exceptions: When there is testimony showing that the inconvenience was the direct and proximate result of negligence or willfulness, it may be taken into consideration by the jury in awarding damages: Cen. R. & B. Co. v. Strickland, 90 Ga. 562, 16 S. E. 352.

Fourteenth exception: Conceding that the request contained a sound proposition of law, it was inapplicable to this case, as the complaint alleged that the conductor was acting within the scope of his authority, when he failed or refused to stop the train at the station: Wilson v. Charleston etc. Ry. Co., 51 S. C. 79, 28 S. E. 91.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

The chief justice did not participate in this opinion because of illness.

A Carrier is Liable to a Prospective Passenger if it does not stop at a station and give him an opportunity to take passage: Heirn v.

McCaughan, 32 Miss. 17, 66 Am. Dec. 588. This rule is applied in the case of passengers at flag stations in Morse v. Duncan, 14 Fed. 396; Illinois Cent. R. R. Co. v. Siddons, 53 Ill. App. 607; Wilson v. New Orleans etc. R. R. Co., 63 Miss. 352. Where a railway company willfully fails to stop at a regular station, it may become liable for exemplary damages: Purcell v. Richmond etc. R. R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

GREENWOOD GROCERY COMPANY v. CANADIAN COUNTY MILL AND ELEVATOR COMPANY.

[72 S. C. 450, 52 S. E. 191.]

ATTACHMENTS Against Nonresidents—Jurisdiction.—If a court seeks to obtain jurisdiction of a nonresident by virtue of an attachment of his property in the state, the jurisdiction and the validity of the attachment depend upon the defendant's actually having property within the state, and if this fact does not appear it is fatal. (p. 628.)

SALES—Bill of Lading with Draft Attached—Reservation of Title.—If a seller ships goods with a bill of lading providing for a delivery to the consignee on payment of the draft attached, the seller prima facie reserves the title and right to the goods until full payment of the draft, and the purchaser obtains no right to their possession by a tender of a less amount than that called for by the draft. (p. 629.)

W. K. Blake and Caldwell & Giles, for the appellant.

Sheppards, Grier & Park, for the respondent.

451 WOODS, J. The complaint in this cause is to recover damages for breach of a contract to deliver a carload of flour to the plaintiff. The defendant being a foreign 452 corporation, an attachment was issued to obtain jurisdiction and under the warrant the flour was seized in the hands of the railroad company at Greenwood, South Carolina. The defendant moved to dissolve the attachment on the ground that it appeared from the complaint and the affidavit the flour was the property of the plaintiff and not of the defendant, and hence the court was without jurisdiction. The motion was refused, and defendant appeals.

The essential facts stated in the complaint and the affidavit are as follows: The defendant, Canadian County Mill and Elevator Company, a corporation resident in El Reno, Oklahoma, contracted to sell and deliver to plaintiff, Greenwood Grocery Company, at Greenwood, in this state, two hundred and fifty barrels of flour at four dollars and fifty

cents per barrel. The defendant consigned to the plaintiff the flour, and sent draft on plaintiff, with bill of lading attached, to the Bank of Greenwood, but the draft required payment for the flour at five dollars and fifty cents per barrel instead of four dollars and fifty cents, the contract price. Plaintiff tendered to the bank the contract price and demanded the bill of lading, but the bank refused to accept less than the full amount of defendant's draft, and, upon plaintiff's refusal to pay more than the contract price, withheld the bill of lading. Thereupon the plaintiff brought this action for damages, attaching the flour in the hands of the railroad company.

The defendant's position is that when the flour was delivered to the carrier consigned to the plaintiff, it ceased to be the property of the defendant, and became the property of the plaintiff, subject only to the right of stoppage in transitu, and that, therefore, the attachment must fall.

The general rule is that an attachment will not be dissolved on the ground that the defendant has no title to the property, or that it is the property of the plaintiff. The defendant's lack of interest in the property would affect the title of the purchaser under the attachment, but not the validity of the process: Drake on Attachments, sec. 417. As said in Metts v. Piedmont etc. Ins. Co., 17 S. C. 120, 123, "the attachment is based on facts disconnected with the [453] property, and it must stand or fall upon these facts." But it is manifest this reasoning does not apply where the court obtains jurisdiction of a nonresident by virtue of the attachment of his or its property in the state. In such case, the jurisdiction and the validity of the attachment depend upon the defendant having property in the state, and if this fact does not appear it is fatal: 4 Cyc. 775. In this case the flour is the property in this state alleged to belong to defendant, and if the title to that has passed from the defendant to the plaintiff, the attachment should be dissolved.

The sole question, therefore, is whether by drawing on the plaintiff with the bill of lading attached to the draft and refusing to deliver the bill of lading without payment of the draft, the defendant retained title and right of possession of the property. The effect of a bill of lading issued by the carrier, who is a third party, on the title to the property as between the consignor and consignee is a question of fact depending not only on the terms of the paper itself,

but on the intention of the parties as expressed by their dealings with each other: 1 Benjamin on Sales, secs. 568, 579, 580; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; 24 Am. & Eng. Ency. of Law, 1066; Hobart v. Littlefield, 13 R. I. 341; Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Kentucky Refining Co. v. Globe Refining Co., 42 L. R. A. 353; Chandler v. Sprague, 5 Met. 306, 38 Am. Dec. 404, note; 23 Eng. Rul. Cas. 383, note.

The fact that a bill of lading is taken making the goods deliverable to the order of the vendor, who is himself the consignor, is very strong prima facie evidence that the vendor, in delivering the goods to the carrier, intended to reserve the title until payment of the purchase money, and when a draft for the price is drawn on the purchaser with such bill of lading attached, the title does not ordinarily pass to him until the draft is paid: Union Cal. Bank v. Rowan, 23 S. C. 339, 55 Am. Rep. 26; 1 Benjamin on Sales, sec. 567; Porter on Bills of Lading, sec. 482; Dows v. National Exchange Bank, 91 U. S. 618, 23 L. ed. 214; Kentucky Refining Co. v. Globe Refining [454] Co., 104 Ky. 559, 84 Am. St. Rep. 468, 47 S. W. 602, 42 L. R. A. 353; Hopkins v. Cowen, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; National Bank v. Crocker, 111 Mass. 167; Bank v. Cummings, 89 Tenn. 609, 24 Am. St. Rep. 618; Farmers' etc. Nat. Bank v. Logan, 74 N. Y. 568; Lanfear v. Blossom, 1 La. Ann. 148, 45 Am. Dec. 76; Stollenwerck v. Thacher, 115 Mass. 224; Erwin v. Harris, 87 Ga. 333, 13 S. E. 513. But this presumption may be rebutted by other circumstances and previous dealing of the parties evidencing a different intention: Porter on Bills of Lading, sec. 485.

In this case, however, it seems by the terms of the bill of lading the goods were deliverable to the consignee. The presumption, therefore, was that the consignor intended the title to pass: Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; 1 Benjamin on Sales, sec. 586. If, therefore, the railroad company had delivered the goods to the consignee without the surrender of the bill of lading and without notice of any reservation of title and possession, it would not be liable to the consignor, though he actually intended to reserve the title and possession until payment of his draft for the price: National Bank v. Atlanta etc. Ry. Co., 25 S. C. 216.

As between the vendor and purchaser the authorities leave no room to doubt, however, that even if the bill of lading provides for delivery to the consignee, yet if the consignor draws for the price, attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment: Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Chandler v. Sprague, 5 Met. 306, 38 Am. Dec. 419; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Cayuga County Nat. Bank v. Daniels, 47 N. Y. 631; Marine Bank v. Wright, 48 N. Y. 1; Halsey v. Warden, 25 Kan. 128; First Nat. Bank of Green Bay v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92. That the intention of the shipper as evidenced by his action in respect to the bill of lading is controlling is supported by the elaborate opinions in Shepherd v. Harrison, 23 Eng. Rul. Cas. 349, [455] especially the opinions of Kelly, C. B., and Lord Chelmsford.

Here, according to the statement of the complaint, and the affidavit, not only did the defendant, the consignor, express its intention to reserve the jus disponendi by presenting through a bank the draft with the bill of lading attached, but the plaintiff expressed this to be also its understanding of the contract by offering to pay the price, as it claimed it to be, as a condition precedent to acquiring possession of the bill of lading, and through it of the flour.

It is argued, however, that according to the complaint, which must be taken as true, the plaintiff tendered the real price agreed upon, and that by such tender he became entitled to the flour without respect to the amount of the draft. This argument is not without force, but it is not convincing nor is it sustained by authority. Even the important case of Mirabita v. Imperial Ottoman Bank, 3 Ex. Div. 164, cannot fairly be said to go to the extent of holding the buyer entitled to recover possession upon tender of any amount less than the draft. The question whether the right to possession would pass to the vendee upon tender of less than the amount called for by the draft if the less amount tendered be the true amount of the purchase money, did not arise and was not decided. There the draft for the purchase money with the bill of lading attached had been sent to the defendant bank, with instructions to deliver the bill of lading upon payment of the draft. The plaintiff ten-

dered the full amount of the draft and demanded the bill of lading. The bank refused to deliver it, claiming it had incurred freight charges which must also be paid, whereas it had done nothing to make itself liable for freight. The case was, therefore, one in which it appeared the defendant bank on its own responsibility had refused to accept the full amount claimed by the vendor as expressed in the draft, upon payment of which the bill of lading was to be delivered to the vendee. Under these facts the bank was held liable to the vendee. Lord Justice Cotton uses the following language: "So, if the vendor deals with or claims to retain the bill of lading in order to secure the [456] contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in Turner v. Trustees of Liverpool Docks, 6 Ex. 543, 20 L. J. Ex. 393; Shepherd v. Harrison, L. R. 4 Q. B. 196; Ogg v. Shuter, 1 C. P. D. 47. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser." From the context and the facts of the case, as hereinbefore stated, it is, we think, manifest that the court is referring to payment or tender of the price as expressed in the draft accompanying the bill of lading, and not some price which the vendee contends to be the true one, different from that expressed in the draft, upon payment of which the bill of lading was to be delivered. The defendant's argument on this point leaves out of view the principle that as between plaintiff and defendant in the circumstances here appearing the flour was shipped on condition that the draft

—not the amount claimed by the plaintiff as the true price —should be paid by the plaintiff before it should have the flour. Until the draft is paid or there is tender of the amount it calls for, the contract is executory, and while in some exceptional cases an executory contract for the sale of chattels may be enforced by an action for specific performance, the rule is [457] that a buyer's action of claim and delivery to recover possession can be founded only on an executed contract of sale: 2 Benjamin on Sales, sec. 1305.

Even if the draft and bill of lading had been sent to the plaintiff itself under such conditions as exist here, it could not have retained the bill of lading, which was the symbol of the goods, without payment, or at least acceptance, of the draft: 1 Benjamin on Sales, sec. 570; 1 Daniel on Negotiable Instruments, secs. 1734, 1734a, 1734b, 1734c; Tiedeman on Commercial Paper, sec. 494; Bank of Rochester v. Jones, 47 N. Y. 497, 55 Am. Dec. 290; Cayuga County Nat. Bank v. Daniels, 47 N. Y. 631; Marine Bank v. Wright, 48 N. Y. 1.

It requires no argument to show that it is of the utmost importance to commerce that a bill of lading should have full effect as an instrument by which a vendor or shipper may retain his right of possession, jus disponendi, using it as a symbol of the property to express his intention as to the conditions upon which the property should be delivered. The courts of this country and of England have with practical unanimity given the bill of lading this force.

But even if the defendant's view were correct, that the tender of the true price as stated by the plaintiff, without respect to the amount required by the draft accompanying the bill of lading, passed to the plaintiff the title and right to possession, the plaintiff would still have his election to sue for the property itself or for damages for breach of the contract in refusing to deliver the goods: 24 Am. & Eng. Ency. of Law, 1149, 1150.

On the facts as presented in the complaint and the affidavit, the defendant is prima facie the owner of the flour.

The judgment of this court is, that the judgment of the circuit court be affirmed.

The chief justice did not participate in this opinion because of illness.

When a Vendor Delivers Goods to a Carrier for transportation to the vendee, the title usually passes to the latter: Scharff v. Meyer, 133

Mo. 428, 54 Am. St. Rep. 672, and cases cited in the cross-reference note thereto. However, if the vendor takes the bill of lading in his own name, this is strong proof that he intends to reserve title in himself: Willman Mercantile Co. v. Fussy, 15 Mont. 511, 48 Am. St. Rep. 698. Where one consigns property to his own order, with directions to notify the purchaser thereof, and sends a draft, with bill of lading attached, requiring payment of the draft before the bill of lading is delivered, he does not part with the title to the property until the draft is paid: Kentucky Refining Co. v. Globe Refining Co., 104 Ky. 559, 84 Am. St. Rep. 468. See, too, Bank v. Cummings, 89 Tenn. 609, 24 Am. St. Rep. 618; Emery v. Irvin Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

GREGG v. BANK OF COLUMBIA.

[72 S. C. 458, 52 S. E. 195.]

TROVER AND CONVERSION—Draft for Collection—Sale of Goods.—If a draft with a bill of lading attached is sent to a bank, with instructions to notify the shipper if the draft is not paid by the consignee, the bank cannot sell the goods to a third person without notice to the shipper without being guilty of conversion. (pp. 635, 636.)

CONVERSION BY PLEDGEE—Tender—Demand.—If a pledgor has no notice of a conversion of pledged property by the pledgee and an application of the proceeds to the payment of the pledgor's debt until after the conversion, he may maintain an action for damages, without tender of the amount due, and a demand for the return of the property. (p. 636.)

CONVERSION—Equitable Relief.—A person having a remedy by an action at law for conversion cannot maintain an equitable action for an accounting. (p. 636.)

CONVERSION—Measure of Damages.—In cases of the conversion of property, the plaintiff is entitled to recover the highest market value up to the time of trial, and the jury may adopt such highest market value as the measure of damages. (p. 637.)

D. W. Robinson, for the appellant.

Barron & Ray, for the respondent.

459 WOODS, J. The Bank of Columbia, defendant in this action, appeals from a judgment recovered against it 460 for damages for the conversion of three carloads of corn. The exceptions charge error in refusing to grant a nonsuit, in the admission of evidence, in the charge to the jury, and in refusing a new trial.

A brief statement of the evidence will so show the true relation of the parties and the rights and duties which grew out of that relation that the case will be relieved of much apparent complication. The business of the plaintiff, Joseph

Gregg, in the city of Chicago, was to ship grain, usually on orders, but occasionally to brokers, for sale on his own account. The three carloads of corn with which we are now concerned had been bought on order, but the orders were canceled before shipment, and thereupon the plaintiff sent them to J. D. Miot, a grain broker, of Columbia, South Carolina, and made separate drafts on him with bills of lading attached for each car of corn, amounting in the aggregate to twelve hundred and thirty-eight dollars and five cents. These drafts were in favor of Wanzer & Co., a large brokerage house of Chicago, who advanced to Gregg the amount of the drafts, and who in turn placed the drafts, with the bills of lading attached, to their own credit in American Trust and Savings Bank of Chicago. This bank sent the drafts and bills of lading to the Bank of Columbia, with instructions to collect and remit proceeds for its credit to National Bank of the Republic in New York. Across the left end of each of the drafts was the following instruction: "Do not surrender documents until draft is paid. If not paid promptly notify ———, Chicago, giving reasons and hold for instructions." The Bank of Columbia received the papers on June 7, 1901, and after several refusals by Miot to accept or pay the drafts, returned them to the Chicago bank. A second time they were sent for collection, and returned after a like unsuccessful effort to collect. Upon receiving them a third time, after again presenting them to Miot, the Bank of Columbia sold the corn to a third party on July 25, 1901, for the face of the drafts, storage charges and freight, and remitted the amount of the drafts, less exchange, to National Bank of the Republic for credit of American Trust [461] and Savings Bank. The plaintiff had no notice of the sale until receipt of a letter from Miot, dated August 7, 1901, advising of his inability to deliver a carload of corn he had contracted to sell, because all the corn had been already sold by the Bank of Columbia. In the meantime corn had advanced in price. The plaintiff's claim was for seven hundred and twenty dollars, alleged to be the difference between the price realized for the corn and the highest market price from the date of the alleged conversion to the time of the trial. The defendant endeavored to prove as a material fact that the intention of Gregg, the drawer, was not, as he alleged it was, to make Miot, the drawee, merely his broker to sell the corn, pay the drafts and account for

the sale, but that Miot should buy the corn and become himself absolute owner on payment of the drafts. Assuming that the evidence left this issue of fact in doubt, it was quite immaterial, in view of the undisputed documentary evidence, what the original position and rights of Miot were, because, if the jury had taken defendant's view, when Miot refused payment of the drafts, which was the condition of his acquiring ownership and possession of the corn, the ownership stood as if the drafts had never left the bank in Chicago. Although the drafts were returned to the Chicago bank and resent for collection several times, the original instruction to hold and notify in case of nonpayment was not only not altered, but was each time resent with the papers. If Gregg sold the corn to Miot on condition that he should pay the amount of the drafts as the purchase price, as the defendant contends he did, then he was bound to take the price agreed upon from Miot, notwithstanding a rise in the price of corn, but the Bank of Columbia had no right to bind him to sell to another at the same price or at any price. While the Bank of Columbia no doubt acted in good faith, the documents in its hands afforded no justification for the sale of the corn.

The Chicago owner of the corn had, through the drafts and bills of lading, invested the Bank of Columbia with legal [462] authority to offer the corn to Miot, whether as purchaser or as agent of the plaintiff is not material, but when he refused to take it, the authority of the bank was at an end, and it had no more right to sell the corn to another than if it had never had the drafts. Such a sale by the bank was, therefore, as much an unwarranted conversion of the property of the owner as a sale made by a stranger would have been. This was not a case where an emergency had arisen. There was no danger of the loss of the corn. It is plain that even the Chicago bank or Wanzer & Co. had no right to order a sale of the corn, if Gregg was the owner, without notice to him and demand on him for payment of his debt, and surely the defendant, a mere collecting agent, had no right to sell without notice to any of the parties concerned. Therefore, the circuit judge might well have charged the jury that the papers held by the Bank of Columbia gave it no authority to sell, and the defendant certainly could not complain when it was left to the jury to say whether, under all the testimony, including the papers, the

defendant bank had such authority, and if they found it had no authority, then it would be guilty of conversion.

Another issue of fact was whether the plaintiff, in drawing the drafts on Wanzer & Co., with the bills of lading attached, and receiving the amount expressed on their face from Wanzer & Co., actually sold the corn or only pledged it as security for money loaned. This issue was plainly stated to the jury, with the manifestly correct instruction if the plaintiff had unconditionally parted with the ownership and right of possession, he could not recover for the conversion.

But the most serious question is, whether the plaintiff could maintain an action for conversion, even if it is conceded he had not parted entirely with the ownership of the corn, but merely pledged it for money borrowed from Wanzer & Co. by indorsing the bills of lading. The defendant made this question by a motion for nonsuit and by appropriate requests to charge. The ordinary relation of pledgor and pledgee imports general ownership of the pledge [463] by the pledgor, and a special property or lien of the pledgee accompanying the possession. Since an interest in property is not sufficient to sustain an action for conversion, unless there is also the right to possession, and since that right is in the pledgee and not the pledgor, the latter cannot, as a general rule, maintain such an action until his right of possession has been regained by payment or tender of the debt secured by the pledge, and demand for the return of the property. There was no proof in this case that plaintiff made a tender to Wanzer & Co., or the Chicago bank, or the defendant, or that he demanded a return of the property from any of them. There was evidence, however, to the effect that the defendant paid Wanzer & Co.'s debt to the Chicago bank, which credited the amount to Wanzer & Co. and thus paid the debt of the plaintiff to that firm. The payment was made by remitting the proceeds of the alleged unauthorized sale, and manifestly if the plaintiff had with knowledge of the conversion acquiesced in this application of the proceeds for his benefit, he would be held to ratify the sale. But, as we have seen, there was evidence that the plaintiff did not know until after the 7th of August of the sale, which had been made on the 25th of July. When the defendant gave notice it had sold the corn, this was notice it was out of its power, or that of the Chicago bank, or

Wanzer & Co., to surrender it to plaintiff. This notice imported that tender and demand would be futile, and that the only remedy of plaintiff would be to recover damages for the conversion, in estimating which the benefits received by the plaintiff must be taken into the account: Gage v. Allison, 1 Brev. 495; Jones on Pledges, sec. 748; 22 Am. & Eng. Ency. of Law, 879.

The plaintiff having the remedy of a suit at law for conversion, an equitable action for accounting, which defendant insists was the proper action, could not have been maintained: Lacombe v. Forstall, 123 U. S. 562, 8 Sup. Ct. Rep. 247, 31 L. ed. 255. The equitable doctrine of accounting had no application, therefore, and was stated by the circuit judge to indicate that if the jury reached the conclusion the Chicago bank [464] or Wanzer & Co., as pledgees, in order to collect their money authorized the sale made by the Bank of Columbia, the remedy then would have been on the equity side of the court to obtain an accounting, and this action could not be maintained. This instruction was not unfavorable to defendant, and clearly was a correct statement of the law.

The defendant next submits, if it was liable at all, the jury should have been confined in estimating damages to the value of the property at the time of conversion, and it was error to charge, "In a case of conversion of personal property the jury may give the highest market value up to the time of the trial." It will be observed the instruction was not that the plaintiff in all cases of conversion is entitled to recover the highest market value up to the time of trial, but that the jury may adopt that as the measure of damages. This was a correct statement of the law as laid down in this state: Carter v. Du Pre, 18 S. C. 179. The just measure in some circumstances may be the value at time of conversion, as was considered by the court in Reynolds v. Witte, 13 S. C. 9, 36 Am. Rep. 678; in other circumstances the just measure might clearly be the highest market value; and the jury may adopt the one or the other, according to their view of the justice of the case. No doubt, if either measure were capriciously adopted, the circuit judge would have the power to relieve against the injustice by ordering a new trial. For instance, if the conversion were made under a bona fide claim of right without grievous wrong or oppression, and it appeared reasonably certain the plaintiff

would have sold about the time of the conversion, manifest injustice would be done to make an enormous sporadic rise in the market price, due to abnormal conditions occurring long after the conversion, the measure of damages. On the other hand, to give only the value at the time of conversion would, in some circumstances, be equivalent to requiring the owner of the property to sell his property at a time and for a price fixed by a wrongdoer. In this case, the jury took as a basis [465] the approximate, if not the exact, value at the time of the conversion, and the defendant has no reason to complain.

The judgment of this court is that the judgment of the circuit court be affirmed.

The chief justice did not participate in this opinion because of illness.

Conversion of Personal Property, sufficient to sustain an action of trover is discussed in the monographic note to Bolling v. Kirby, 24 Am. St. Rep. 795-819. A sale by one person of the goods of another is a conversion: Leader v. Plante, 95 Me. 343, 85 Am. St. Rep. 418.

The Measure of Damages for the Conversion of personal property is discussed in the monographic note to Baker v. Wheeler, 24 Am. Dec. 70-88. The general rule seems to be that the true measure is the value of the property at the time of the conversion, with interest: Wing v. Milliken, 91 Me. 387, 64 Am. St. Rep. 238; Pope v. Benstei, 42 Neb. 304, 47 Am. St. Rep. 703. If the conversion is made in good faith and under a mistake as to the owner's rights, the damages are not measured by the highest market price up to the day of the trial: Wright v. Metropolis Bank, 110 N. Y. 237, 6 Am. St. Rep. 356. But see Terry v. Birmingham Nat. Bank, 93 Ala. 599, 30 Am. St. Rep. 87; Dimock v. United States Nat. Bank, 55 N. J. L. 296, 39 Am. St. Rep. 643.

CASES

IN THE

SUPREME COURT

OF

UTAH.

STATE v. SHOCKLEY.

[29 Utah, 25, 80 Pac. 865.]

CRIMINAL LAW—Committing Magistrates—Statutory Construction.—The provision of the Utah statutes conferring jurisdiction on the judges of city courts to act as committing magistrates is not in conflict with a constitutional provision that "the judges of the supreme court, district courts and justices of the peace shall be conservators of the peace and may hold preliminary examinations in cases of felony." (p. 646.)

CRIMINAL LAW—Self-defense—Abandonment of Assault.—Where a person makes an unprovoked assault on another for the purpose of committing a felony, before the assailant can claim or exercise the right of self-defense he must in good faith abandon his criminal design and withdraw from the contest, and at the same time notify his adversary of such abandonment in such a way as to manifest his good faith and to remove all just apprehension there may be in the mind of the person assaulted that the withdrawal may be only a ruse to enable the assailant to gain some undue advantage and again renew the assault (p. 648.)

CRIMINAL LAW—Self-defense—Abandonment of Assault.—Where a person boards a street-car for the purpose of robbery, covers the employés with his gun, but as one of them draws a gun and directs him to throw up his hands, retreats and falls at the door, whereupon they rush upon him, and he, keeping his gun in his hand ready to shoot, giving no notice of an intention to abandon his felonious purpos and attempting to make his escape, shoots one of them, he is not entitled, on a trial for murder, to an instruction on the law of self-defense relative to the question of abandonment of his criminal design. (pp. 648, 649.)

CRIMINAL LAW—Arrest by Private Citizen.—Under a statute providing that a private citizen may arrest a person for an offense attempted in his presence, where a person boards a street-car for the purpose of robbery, whereupon an employé of the railway company directs him to put up his hands, he is in effect under arrest, and it becomes his duty to throw down his gun and surrender, and the

employé has a right to use whatever force is necessary to disarm him and prevent his escape. (p. 650.)

CRIMINAL LAW—Self-defense—Retreat of Assailant.—Where a person, intending to commit a robbery, covers another with a pistol, whereupon the latter himself draws a pistol and directs the robber to throw up his hands, the robber, as he retreats and attempts to escape, is not, in respect to the right of self-defense, in so favorable a position as is the aggressor in a sudden quarrel who withdraws from the combat and place of encounter. (p. 650.)

CRIMINAL LAW—Felonious Assault—Justifiable Homicide.—Where a person boards a street-car for the purpose of robbery, covers the two railway employés thereon with his pistol, but, as one of them draws a pistol and directs him to throw up his hands, retreats and falls at the door, whereupon the two rush upon him, and he, though attempting to escape, keeps his gun in his hand ready to shoot and gives no notice of an intention to abandon his felonious purpose, either employé is justified, at any stage of the affray, in shooting him down to protect their own persons and to prevent his escape. (p. 651.)

CRIMINAL LAW—Evidence of Other Offenses—Part of Same Transactions.—Where a person who attacked two companions is on trial for killing one of them, it is proper to refer to his shooting at the other during the affray, to show his state of mind and his "abandoned and malignant heart." (p. 651.)

WITNESS—Incriminating Question—Waiver.—The right of a witness in a criminal trial to refuse to answer incriminating questions is a personal privilege which he may exercise or waive; if he chooses to answer them, neither he nor his counsel can legally object. (p. 654.)

WITNESS—Accused in Criminal Case—Exercise of Privilege through Counsel.—Where the defendant in a criminal prosecution takes the stand in his own behalf, he does not, for the time being, forfeit his constitutional right to the assistance of counsel; and if incriminating questions are put to him, he need not personally make objection and claim his privilege, but may claim his immunity through his counsel. (p. 657.)

WITNESS—Accused in Criminal Case—Cross-examination as to Other Crimes.—When a person on trial for a criminal offense testifies in his own behalf, it is a prejudicial abuse of discretion to permit the state, over his objection, to interrogate him respecting his commission of other crimes in no way connected with the one for which he is being tried, unless the questions relate to offenses for which he has been convicted, and then only for the purpose of affecting his credibility. (p. 659.)

H. A. Smith, for the appellant.

M. A. Breenden, attorney general, for the respondent.

[29] McCARTY, J. The defendant was convicted of the crime of murder in the first degree for the killing of one Amasa L. Gleason, and was sentenced to be executed. Defendant is the only living eye-witness to the tragedy, and the facts and circumstances leading up to and surrounding the commission of the crime, as testified to by himself, are as follows: On January 6, 1904, he went to the corner of

Thirteenth and Second South streets, Salt Lake City, Utah, for the purpose of "holding up" a street-car and robbing the employés of the street-car company who were in charge of the car. He said, quoting his own language as shown by the record: "On the night of the 6th I left my room near 11:20; went to the scene of the hold-up. I went up to the car; looked through the east windows at the motorman and conductor. The men were standing near each other at the north end of the car. The larger man had something in his hand, a book or transfer slip, or something; it was Mr. Brighton. Gleason was standing near him; the men were talking. I went into the car; started toward where the men were. They did not look around until I was probably a couple of steps in the car; I walked nine or ten feet in the car when the men looked around; they first noticed me when I took two steps. The gun was in my hand in this position. I told them to put up their hands. The larger man put up his hands. The small man, Mr. Gleason, said: 'You had better hold up your hands.' Those were the very words he said; he spoke in a very calm manner. I realized then if I continued there might be a chance of hurting them, so I started back out of the car; put my gun down by my side, thinking they would know by that movement that I intended to leave. When I was a couple of feet from the door, for some reason—I do not know whether it was the snow being balled upon my heels, or what it was—I went to turn; my feet slipped, and I went down. There was nothing said or done by the men up until this time except as I have stated; there was nothing done or said to cause me to abandon the thought of taking the money from these men. The two [39] men started toward me as soon as they saw me down in this position. As soon as they made a rush for me I fired a shot. I do not know where it went to. That was the first shot fired, and must have been fired in the direction of the door. I fired the shot thinking the men would stop and would not kill me, for I had seen the small man take a gun. Where he took it from I do not know; I saw it in his hands as he started. As soon as the shot was fired the men almost fell over me. It wasn't very clear, just exactly, all that happened during the excitement, but as near as I remember the large man (Brighton) took hold of me with the back of

my coat and hold of one arm. I knew when I saw the gun in that man's hand he intended to shoot me. I finally succeeded in getting on my feet. Gleason, at the time, had stepped back with his gun and taken it in both hands; I presume he was trying to get it to work; I did not know the cause it didn't fire; I knew he attempted to fire, and it wouldn't fire. I had the gun up in that shape, and then was when the thought entered my mind, if I could hit this man's arm it would likely prevent him from firing; so I started to pull down with the gun with the intention of trying to hit his arm, and, at the same time that I started to pull down with the gun, the large man, Mr. Brighton, I presume took hold of me, ... jerking me back a little bit. With the movement that caused him to jerk me back he threw his right hand around my head, ... reached across and grabbed my arm below the elbow with his left hand at the same instant that he jerked me back, and then was when the gun was discharged. I don't know positively which shot hit Gleason as I have claimed all along. I didn't know the shot was going to be fired at that time; I didn't do it voluntarily; I didn't know whether he was hit or not; I didn't know that I had hit Gleason until I read the papers next morning. As soon as I felt the gun explode I wrenched loose from Mr. Brighton and tried to go out of the door. Then Mr. Brighton got between me and the door, ... and I reached up with my left hand and tried to turn him around like; he grabbed me, as near as I can [31] remember, by this coat sleeve with his right hand, ... and began to reach under his coat, and then it was that I did manage to say—I said it clearly; I know the man heard me—I said: 'For God's sake, man, don't kill me; I will give up'; and he never made any answer whatever, but continued to keep his hand under there. Well, I suppose Mr. Brighton and I was scuffling; in fact, I would not have fired at Mr. Brighton until I had seen his gun, but I thought very likely this other man, Mr. Gleason, was right behind with his gun ready to shoot me in the back of the head. Q. Now, what did Mr. Brighton do when you shot at him? A. Well, he seemed to just stand still and let loose of me with his right hand; seemed to just stand still; then I brushed by him and got out of the car." Defendant further stated: "It is clear everything was done very quick; great excitement;

that the shooting of Gleason was wholly accidental." Defendant also testified as follows: "Q. Now, Mr. Shockley, at the time, at or near the time, did you make any effort to speak to these men? A. I did. I did when they first took hold of me. Q. What did you say, or try to say, as near as you can remember? A. Well, I tried to tell them when he (referring to Gleason) started to put the gun down, I tried to tell him not to kill me. I was willing to give up to him, and, as to whether I made it clear or not, I don't know; I know I tried and stuttered considerably. Q. Now, I will ask you to state, Mr. Shockley, whether or not you were willing, at every moment of the time after you started to back out, after the men started after you, until you left that car, to give up and let those men take you? A. I was willing, sir, they should take me prisoner if they had said anything that indicated that was their intention, rather than have shot a man. Q. Did they make any remarks to you in any way asking you to give up, or you were a prisoner, or under arrest? A. Nothing whatever; there was no remarks except the smaller man (Gleason) saying, 'You had better put up your hands.'" The defendant also made a voluntary written confession, which was introduced by the state in evidence, which was substantially the same as his oral testimony. A preliminary [32] examination was had before the judge of the city court, and the defendant bound over to the district court. A trial was had in the last-named court, which resulted in the conviction of the defendant of murder as hereinbefore stated. From the judgment rendered on this verdict defendant has appealed to this court.

Appellant contends that the judge of the city court had no jurisdiction to act as a committing magistrate, and therefore the district court was without jurisdiction to try the case. The constitutional and statutory provisions bearing upon this question are as follows: Section 1, article 8 of the constitution provides that: "The judicial power of the state shall be vested in the Senate sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace and in such other courts inferior to the supreme court as may be established by law."

Section 21 provides that the "judges of the supreme court, district courts and justices of the peace shall be conservators of the peace and may hold preliminary examinations in cases of felony."

Section 14, chapter 109, page 113 of the Session Laws of 1901, provides that: "The city court shall have original jurisdiction of cases arising under or by reason of the violation of any city ordinances, and shall have the same powers and jurisdictions as justices of the peace in all other criminal actions, and the judges of said courts shall be magistrates with all powers and jurisdiction of the justices of the peace as magistrates."

It is conceded that under and by virtue of said section 1 of the constitution, the legislature had authority to create the city [33] court, but it is contended that the foregoing provision of the statute, so far as it attempts to confer jurisdiction upon the judge of said court to act as a committing magistrate, is in conflict with said section 21 of the constitution. Counsel for appellant insists that the word "may" in section 21 should be construed to mean "shall," and, when so construed, the doctrine of expressio unius est exclusio alterius applies, which, they claim, limits the jurisdiction to hold preliminary examinations in cases of felony exclusively to the officers mentioned in said section. By a careful reading of this section of the constitution it at once becomes apparent that such could not have been the intention of the framers of that instrument. The section provides that the officers therein mentioned "shall be conservators of the peace and may hold preliminary examinations." It will be observed that its provisions impose upon such officers two separate and distinct classes of duties. In the first place, circumstances might arise where it may become necessary for them to perform duties of peace officers, and, second, might be expedient and necessary to act in their judicial capacity as committing magistrates. It is plain, however, that, if the maxim referred to governs in the construction of the language investing them with judicial powers, it must also control in the construction of the language which makes them peace officers. Now, if this rule of construction is to obtain in the case, it would necessarily follow that the "judges of the supreme court, district courts and justices of the peace," and they only, to the exclusion of all other officers, could lawfully act as conservators of the peace, and it would therefore devolve upon these three classes of officials to police the entire state of Utah. Neither sheriffs nor policemen would have the authority, when the peace and tranquility of the public is menaced or disturbed,

or lives and property of citizens endangered by unlawful and riotous assemblies, to disperse the offenders or make arrests. For the word "conservator," when used and associated as it is here, has a clear and well-defined meaning. Webster defines it as "an officer who has charge of preserving [34] the peace, as a justice or sheriff." Bouvier defines the term as "he who hath an especial charge, by virtue of his office, to see that the king's peace is kept": Bouvier's Law Dictionary, 401. In 8 Cyclopedia, 586, conservators of the peace are defined as "common-law officers whose duties, as such, were to prevent and arrest for breaches of the peace in their presence." It must be apparent that, if the construction contended for by appellant should be followed, not only would it devolve upon the officers mentioned in said section to preserve the public peace throughout the state, but, in many cases, they would be forced to perform the functions of bailiffs and ministerial officers in the courts over which they presided. It is plain that a construction which would lead to such mischievous and absurd results cannot be seriously considered, where, as in this case, such consequences can be avoided by giving to the language of the provision of the constitution under consideration its plain and ordinary meaning: Sutherland's Statutory Construction, sec. 238; Endlich on Interpretation of Statutes, 258. The first part of section 21 which provides that certain officers "shall be conservators of the peace," is imperative; that is, in cases of breach of public peace committed in their presence it would be their duty, if the exigencies of the occasion required, to take such steps and adopt such measures as, in their judgment, would be necessary to quiet the disturbance and preserve the public peace. The latter part of the section, which provides that they may hold preliminary examinations in cases of felony, imports an authority to do so, but does not impose a positive duty in this respect. Therefore, it is evident that the words "shall" and "may" are used advisedly, and each is to be understood in its usual and ordinary sense. For it is a familiar rule of constitutional and statutory construction that words and phrases are to be given their general and popular meaning, unless the context or the nature of the subject otherwise indicate: 8 Cyc. 732, and cases cited in note; Black on Iinterpretation of Laws, p. 28; Sutherland's Statutory Construction, sec. 732. Endlich, in his work on the Interpretation of Statutes

(section 507), states the rule as follows: [35] "Indeed, the language of the constitution, owing its whole force to its ratification by the people, is always to be taken in its common acceptation—its plain, ordinary, natural, untechnical sense—unless the very nature of the subject indicates, or the context suggests, that it was used in its technical sense. It must also be presumed that the people who adopted the constitution understood the force and extent of the language used, and that the language has been employed with sufficient precision to convey the intent. It follows that, where the words of the constitutional provision, taken in their ordinary sense and in the order of their grammatical arrangement, embody a definite meaning, which involves no absurdity or conflict with other parts of the same instrument, the meaning thus apparent on the face of the provision is the only one that can be presumed to have been intended, and there is no room for construction."

By adherence to this rule in the construction of the provisions last referred to of the constitution, we not only give to the language used its plain and ordinary meaning, but avoid the absurdities and mischievous consequences heretofore pointed out which would inevitably result should we adopt the construction contended for by appellant. We fail to discover any conflict whatever, either in letter or spirit, between the provisions of the constitution referred to and the provisions of the act creating city courts and defining their jurisdiction.

The defense requested the court to give the jury the following instruction: "If you find from the evidence that Mr. Gleason was shot by the defendant after the attempt to rob had been voluntarily and in good faith abandoned by the defendant, and that Gleason was not at that time in danger of being robbed, and by the conduct of defendant Mr. Gleason understood these facts, and that if Mr. Gleason afterward assaulted the defendant in such a way as to induce in the defendant [36] a reasonable belief that he was actually in danger of great bodily harm or of being killed, and if you believe that Mr. Gleason had his gun in his hand or hands, and was working with it, and the defendant had reason to believe, and did believe, that Mr. Gleason intended to renew the attack upon him for the purpose of doing him great bodily harm or killing him, then the defendant would be justified in cocking his revolver and preparing to shoot Mr.

Gleason in the arm for the purpose of preventing such great bodily harm or killing; and if, while his gun was so cocked and in his hand, the gun in the hands of the defendant was accidentally discharged, either from the conduct of Mr. Brighton or from any other cause, and Mr. Gleason was killed thereby, then the defendant would not be guilty of murder in the first degree." The court refused to give this instruction and others of like import asked for by defendant. Neither did the court refer to the question of abandonment and self-defense in its instructions to the jury. Counsel for defendant contend that there is evidence in the record which tends to show that when Gleason refused to comply with his command to "put up his hands," and assumed an attitude of resistance and showed a determination to resist force with force, he, the defendant, abandoned his intent to commit robbery and withdrew from the contest which he, by his own criminal act, had precipitated, and that the court erred in refusing to instruct the jury on the question of abandonment and right of self-defense as requested. We have made a thorough and critical examination of the record in this case and have failed to find any evidence whatever upon which an instruction on the question of abandonment and right of self-defense could properly have been predicated. We have in substance quoted all the evidence bearing on this question, and it conclusively shows that the actions of the defendant, from the time he entered the car for the purpose of robbery and until the homicide of Brighton, all constituted one continuous transaction. According to his own testimony, he entered the street-car for the purpose of robbery, and in pursuance and in the attempt thereof, ordered Gleason and Brighton to "put up their [37] hands," which Gleason refused to do, but told defendant to "put up his hands," at the same time drawing his own revolver. Defendant, on seeing the pistol in Gleason's hands, started to back out of the car. When near the door he fell, and Gleason and Brighton rushed toward him. When he saw them coming he fired a shot from his gun, but did not know whether it hit Gleason or not. Brighton and Gleason both took hold of the defendant while he was down. Gleason had hold of him with one hand, and in the other hand his gun, which he tried to fire at defendant, but for some cause it would not go off. Gleason let go of defendant and stepped back, and with both hands tried to

fire his pistol at him. Defendant, as he says, believing that Gleason was trying to kill him, raised his gun to fire at and hit his (Gleason's) arm, but in the scuffle the gun, when it was fired, had been brought in a more direct range of Gleason's body. After firing this shot defendant endeavored to leave the car, but Brighton, who had hold of him, stood between him and the door. Brighton at this juncture put one of his arms under his coat, and defendant, as he says, believing that by this move he was attempting to draw a gun, shot and killed him, and then left the car. He also testified that when he was down he tried to tell Gleason and Brighton that he was willing to surrender, but did not know whether or not he made himself understood. The law is well settled that where a party makes an unprovoked assault on another for the purpose of committing a felony, as was done in this case, before the assailant can claim or exercise the right of self-defense, he must in good faith abandon his criminal design and withdraw from the contest, and at the same time notify his adversary of such abandonment in such a way as to manifest his good faith and to remove all just apprehension there may be in the mind of the party assaulted that such withdrawal may be only a ruse for the purpose of enabling the assailant to gain some undue advantage and again renew the assault. And in this case a much stronger reason exists for the application of this rule than usually obtains in other cases of criminal assault. For it is a matter of common knowledge that, when a party [38] assaults another for the purpose of robbery, he does so with the premeditated design of killing his victim should it become necessary to do so in order to accomplish the robbery, make good his escape, or to protect his person when being attacked by the victim in resisting such attempted robbery. And the legislature, recognizing such to be the case, incorporated into the Penal Code, among other things, the following provision: "Every murder committed in the perpetration of robbery is murder in the first degree": Rev. Stats. 1898, sec. 4161. When the defendant covered Gleason and Brighton with his revolver and ordered them to put up their hands, they had a right to presume, and to act upon such presumption, that in case either of them failed to comply with his demand he would do precisely what he did do, viz., shoot them down. And, so long as he kept his gun in his hand prepared to shoot, they were neither expected

nor required to construe and accept any act or statement of his as an intent on his part to discontinue the assault and surrender himself as a prisoner. That he had at no time after Gleason told him he had better put up his hands intended to drop his gun and surrender himself as a prisoner, the only legal thing left for him to do under the circumstances, is made plain by his own testimony: "I didn't say a word when Gleason told me to put up my hands; I didn't think it necessary to drop my gun, because at that time the men had made no movement; I did just like any other human being would when I thought I was going to lose my life: I did not voluntarily drop the gun under the circumstances, and no other man under God's sun would; I knew I needed the gun; my life depended upon it." And again he says: "A man going to perpetrate a hold-up would think he was going to get away; I suppose he would use every protection he could to get away."

In the case of State v. Smith, 10 Nev. 106, the court, in discussing the question, said: "A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him by his conduct that he has abandoned the contest, and if the circumstances [39] are such that he cannot so notify him, it is his fault, and he must take the consequences."

In the case of People v. Button, 106 Cal. 628, 46 Am. St. Rep. 259, 39 Pac. 1073, 28 L. R. A. 591, it is also said: "In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated, and afford no assurance to the party assailed that the need of defense is gone." And again, in the same opinion: "It is therefore made plain that knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless."

In 25 American and English Encyclopedia of Law, 270, the rule is stated as follows: "While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his

own. In such a case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct." And again it is said, on page 271: "If the circumstances are such, arising either from the condition of his adversary, caused by the aggressor's acts during the affray, or from the suddenness of the counter attack, that the original assailant cannot so notify his adversary, it is such assailant's fault, and he must take the consequences": 1 McClain's Criminal Law, secs. 309, [40] 310; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754; Parker v. State, 88 Ala. 4, 7 South. 98; Carpenter v. State, 62 Ark. 286, 36 S. W. 900; People v. Robertson, 67 Cal. 646, 8 Pac. 600; Smith v. State, 73 Ga. 79.

Section 4638 of the Revised Statutes of 1898 provides that a private person may arrest another "for a public offense committed or attempted in his presence." Therefore, when Gleason stated to defendant that "he had better put up his hands," it was his duty to throw down his gun and surrender himself as a prisoner. And Gleason and Brighton, under the foregoing provision of the statute, had a right to use whatever force was necessary to disarm him and prevent his escape. The same rule does not govern in this case that applies to parties engaged in a mutual combat, or one that arises from a sudden quarrel or heat of passion, wherein both parties may be at fault. In such a case the aggressor, if he can do so, may in good faith withdraw from the combat and place of encounter, and, if he does, the party assailed is not justified in pursuing him for the purpose of continuing the affray. In this case the defendant was acting in the role of an outlaw and hold-up. He was endeavoring to, and in fact was in the act of robbing a couple of blameless and inoffensive men, and, when he was told to put up his hands, he was in effect placed under arrest; and the killing of these men, under the circumstances as related by himself in order to make his escape, was just as culpable and indefensible as though he had, without warning, shot them down when he first entered the car. At no time from the moment he entered until he fired the fatal shot that killed Gleason did he do anything that would even suggest that he intended in good faith to withdraw from the contest, much less abandon his felonious attempt of robbery or surrender himself as a prisoner. True, according to his

testimony, which, for the purpose of this case, we must accept as true, after he had shot Gleason he said to Brighton, "For God's sake, man, don't kill me; I will give up." When he made this statement he had already committed the crime [41] for which he stands convicted. And, even if this declaration had been made in good faith, under the circumstances it would avail him nothing. Brighton had made no statement or move, so far as shown by the record, that would even justify an inference he had in his possession a deadly weapon or intended to use one upon defendant, notwithstanding, under the circumstances, he had a perfect right to use whatever force was necessary to overcome defendant's resistance, even to the taking of his life. While the defendant is not on trial for the killing of Brighton, yet as the entire affray was one continuous transaction, it is proper to refer to the shooting of Brighton for the purpose of showing the state of mind of the defendant and illustrating the circumstance and cause of shooting of Gleason, and in the language of the statute, of showing the "abandoned and malignant heart" of the defendant.

In concluding the discussion of this branch of the case, we have no hesitancy in saying that, according to defendant's own testimony, which, as hereinbefore stated, we must assume to be true, from the time he entered the car and told the occupants to throw up their hands, and until he killed Brighton, there was not a moment that either Gleason or Brighton would not have been justified in shooting him down—first, for the protection of their own persons and lives; and, second, to prevent his escape. And there is an entire absence of testimony that would even tend to suggest that he, at any time after the affray began, ceased to be the aggressor. This is conclusively shown by his testimony, wherein he stated, referring to the time he slipped and fell: "There was nothing said or done by the men up until this time, except as I have stated; there was nothing done or stated to cause me to abandon the thought of taking the money from these men." In reading the record, one looks in vain to find any evidence that prior to the shooting of Gleason the defendant gave notice of any kind of any intention of abandoning his attempted robbery or of ceasing from his felonious assault. The instructions asked for by the defendant were therefore properly refused.

[42] The defendant was sworn as a witness, and testified in his own behalf. On direct examination he stated that he was twenty-six years of age; that he was born in the state of Missouri, and that his father, mother, and two sisters reside there; that he purchased the revolver in Idaho with which he did the killing; and that he arrived in Salt Lake City January 2, 1904. He then gave a detailed account of his actions leading up to the commission of the crime. He did not testify in relation to, nor did he introduce any evidence bearing upon, his past life. Neither did he introduce any evidence respecting his reputation for peace and quietness, or otherwise put his character in issue. On cross-examination the defendant was asked the following question: "Q. Did you hold up a street-car in this city last July, 1903?" Counsel for "the defendant objects to this question and the evidence proposed to be adduced thereby, on the ground that it is incompetent, irrelevant, and immaterial to affect the credibility of the witness, and for every other purpose; that it is not proper cross-examination; and that it tends to incriminate the defendant." Hereupon the jury were excused from the courtroom to enable counsel to argue the matter. "H. A. Smith (defendant's counsel): The defendant joins with his attorneys in making this objection; he joins in the objection, and claims it is privileged. District Attorney: I think the defendant should make his claim in front of the jury when the defendant was asked the question, and I object to the record showing what is not a fact. The Court: The record will merely show the statement made by counsel. Mr. Smith: I will ask Mr. Shockley if he joins with me in that objection? District Attorney: I object to it; no jury present. The Court: You need not ask the defendant any question, in the absence of the jury. Mr. Smith: I didn't think there was any question, but the defendant had the right to refuse to answer any question that would incriminate him, except the matter in issue. The Court: If the defendant had made that objection. I don't think counsel can make the objection." Whereupon the jury returned into the courtroom. "The Court: In view of the suggestions that have been made, [43] the court will inform you, Mr. Shockley, that you are not required to give any answer which would tend to subject you to punishment for a felony." Thereupon counsel for defendant renewed his objection as before stated, and also

asked whether or not "you join with me in making that objection, and whether you don't make it yourself." "The Witness: I do make the objection myself. District Attorney: Just a moment. Now, I object to the question. This defendant has got certain privileges which he must claim himself, which the supreme court has distinctly said his counsel cannot claim for him. The Court: Mr. Shockley, under the instructions given you by the court, do you claim the privilege and decline to answer the question on that ground—that it tends to incriminate you, and subject you to punishment for felony? The Witness: I decline to answer the question upon that ground. District Attorney: Upon the ground it tends to incriminate you? Mr. Smith: We object to it, if your honor please. The Court: Yes, that is sufficient on that subject. District Attorney: Mr. Shockley, didn't you last July, at South Temple and Thirteenth East street, hold up a street-car and rob the motorman and conductor, or either of them? Mr. Smith: We make the same objection, if your honor please. The Court: The objection is overruled. District Attorney: Answer the question. Mr. Smith: Wait a minute. The court will inform the witness. The Court: If he sees fit to decline to answer these questions, he has a perfect right to do it, under the instructions of the court. Answer the question, unless you decline to. The Witness: I decline to answer the question on the same grounds. The Court: You are excused from answering it. District Attorney: Mr. Shockley, didn't you, in this city, last July, hold up a street-car on Douglas Line and attempt to rob the conductor or the motorman, or both, at Thirteenth East and about Fifth South? The Witness: I decline to answer. District Attorney: On the ground that it would tend to incriminate you? Mr. Smith: I object to that, if your honor please. Witness has stated the ground. The Court: Yes, on the same ground. District Attorney: Didn't you, last July, [44] Shockley, at Tenth East and Fifth South, shoot at a motorman or conductor, or street-car, a car running, a car up on the Fort Douglas Line? The Witness: I decline to answer the question, sir, upon the same ground as before." The question was also asked the defendant if he had not deserted from the United States army, and, against the objection of his counsel, was required to answer the question, and answered that he did so desert. The

action of the court in the above rulings is now here complained of as error.

The first question presented by this assignment of error is, Was it incumbent upon the defendant to personally make the objections and claim his privilege from answering the questions asked respecting the commission of other crimes by him, or did he have the right to make his objections and claim his privilege and immunity through his counsel? The general rule is that the right to refuse to answer incriminating questions is a personal privilege of the witness, which he can either exercise or waive. And the authorities all agree that, if the witness chooses to answer incriminating questions, neither the defendant nor his counsel can legally object. But we do not understand the authorities to hold that, when the witness is also the defendant in the case, his counsel cannot speak for him and make the proper objections and protect him in his right and immunity from answering questions on cross-examination respecting the commission by him of other crimes which are in no way connected with the one for which he is on trial. We have been able to find but three cases which go to the extent of holding that, when a defendant takes the witness-stand in his own behalf, he, for the time being, in effect ceases to be a defendant, and forfeits his constitutional rights to the assistance of counsel. The first case is that of State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688, and the court, in that case, bases its conclusions upon certain New York cases cited in the opinion. It will be seen by an examination of those cases that the question as to whether the defendant can speak through his counsel and claim his immunity from answering incriminating questions was not before the court in either of them. The New York court in a later decision (People v. [45] Brown, 72 N. Y. 571, 28 Am. Rep. 183), has passed upon this identical question, and Chief Justice Church, speaking for the court, says: "I understand it to be conceded by the counsel for the people that this objection would be valid if it had been taken by the witness himself instead of the counsel. Such is the rule as to a witness who is not himself a party. It is then a question between the witness and the court, with which the party has nothing to do, and with which counsel of the party has no right to interfere. But when the witness is also the party, I see no reason for the application of this

rule. By taking the stand as a witness, while he may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party; and it follows that his counsel, while he is in the witness-box, has a right to speak for him, and that an error committed by the court against him may inure to his benefit as a party. Especially ought this protection to be afforded to persons on trial for criminal offenses, who often, by a species of moral compulsion, are forced upon the stand as witnesses, and, being there, are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice, or crime of which they may have been guilty, or suspected of being guilty, is brought out, ostensibly to affect credibility, but practically used to produce a conviction for the particular offense for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly unjust, and every protection should be afforded to guard against it. I am of opinion that the witness was privileged from answering the question, and that the objection was well taken by his counsel, and that the exception is available to him. Neither in Brandon v. People, 42 N. Y. 265, nor in [46] Connors v. People, 50 N. Y. 240, was the question of privilege presented."

The two New York cases mentioned in the opinion just quoted are the cases cited in the case of State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688. The next case is that of People v. Larsen, 10 Utah, 143, 37 Pac. 258, which is cited and relied upon by the attorney general as decisive of this question. In that case the defendant, who had testified as a witness in his own behalf, was asked on cross-examination the following question: "Have you ever been arrested for a crime similar to this?" The court, in the course of the opinion, says: "In this case the question was not claimed by the witness to be privileged. It was simply objected to by counsel as immaterial, irrelevant, and not cross-examination. Nor did it imply an answer which would prove a link in a chain of testimony and render it sufficient to convict him of crime. Nor would it be criminative evidence at all." It will thus be observed that the question now under discussion was not in any sense at all before the court. Therefore, while the expressions of the court on this question in that case are entitled to respect-

ful consideration, they cannot be regarded as a precedent by which this court must be bound in this and other like cases, should any arise. The only other case we have been able to find in which this doctrine is announced is the case of State v. Kent, 5 N. Dak. 516, 67 N. W. 1052, 35 L. R. A. 518. By an examination of that case it will be seen that on the cross-examination of the defendant he was questioned about the commission of other crimes by him, for the purpose of showing a motive for the commission of the crime for which he was on trial. To this course of examination counsel for the defendant objected, and based his objection on the grounds that it was incompetent, irrelevant, immaterial, improper cross-examination, and that the statements were privileged, which privilege was claimed both by counsel and defendant, and that the defendant declined to answer the questions on the ground that it would tend to disgrace him. There was evidence in the record which tended strongly to show that he had committed the crime for which he was on trial for the purpose [47] of preventing exposure of the crimes about which he was questioned on cross-examination, which evidence he had specifically denied in his examination in chief, and the court in that case very properly held that the cross-examination was proper. In the course of the opinion it is said: "There is ample authority for the proving of alias and collateral crimes for the purpose of showing the motive for the commission of the crime for which the defendant is being tried, the limitation being that such alias crime must bear such a relation to the crime for which the party is being tried that the court can clearly see that, if established, it will have a tendency to furnish motive for the commission of the other crime." And again the court says: "Plaintiff in error had denied what Swidenski had testified was his self-declared motive. The subject of motive being thus opened up, it was proper to cross-examine him upon the entire subject." The court having determined, and very properly so, that the questions, under the circumstances of that case, were not privileged, the question as to whether the objection should be made by counsel or in person by the defendant became unimportant; and the opinion of the court, wherein it is held that the defendant in that case could not speak through his counsel and claim his privilege from answering questions that would tend to disgrace him, but

that it was incumbent upon him to personally make the objection, at most, was only dictum. The court having held that the questions were not privileged, and that the defendant was properly compelled to answer them, the question as to whether a defendant in a criminal case who desires to claim his exemption from answering disgracing or incriminating questions is bound to claim his privilege personally or may do so through his counsel was no longer before the court: McKelvey on Evidence, 304. The rule announced by the New York court of appeals is more in accord [48] with the letter and spirit of our state constitution (section 12, article 1), which provides, among other things, that "in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, ... (and) to testify in his own behalf," than the doctrine contended for by the state's attorney. To hold that, when a party accused of crime exercises his constitutional right and testifies in his own behalf, his right to appear by counsel is temporarily suspended, would, in effect, be holding that by the exercise of one of these constitutional rights the accused forfeits the other, and would lead to a construction which would be both unreasonable and absurd: Underhill on Criminal Evidence, sec. 66; State v. Beal, 68 Ind. 345, 34 Am. Rep. 263; Clifton v. Granger, 86 Iowa, 573, 53 N. W. 316.

The next question raised is, Did the trial court err in permitting the district attorney, over defendant's objections, to ask him, on cross-examination, the questions hereinbefore mentioned respecting the commission by him of other crimes, none of which were in any way linked or connected with the one for which he stands convicted? The testimony thus sought to be elicited in no way tended to prove any issue, fact, or circumstance in the case. Nor did it directly or remotely refer to any fact or circumstance testified to by him, or that came within the range of his examination in chief. We recognize the well-established rule that a defendant, when he takes the witness-stand in his own behalf, may be cross-examined the same as any other witness. He may be examined as to any fact, occurrence or transaction relevant to the issue, or which sheds light upon the commission and character of the offense for which he is on trial. And he may be questioned for the purpose of testing his memory, and examined as to matters which

tend to discredit his testimony or which affect his credibility as a witness. But it is apparent that the questions complained of in this case were not asked, nor was the evidence sought to be elicited thereby, for any such purpose. And it is apparent that the questions were not asked, nor was the evidence sought to be elicited thereby, for the purpose of affecting his credibility as a witness or the weight of his testimony, [49] but were evidently intended to prejudice him before the jury. Besides, the state depended almost entirely upon the confession made by the defendant for conviction. For without this confession it is extremely doubtful if a conviction could have been procured. Now, the facts and circumstances leading up to and surrounding the commission of the crime, as testified to by the defendant are substantially the same as contained in his confession. The state, by impeaching his testimony, would necessarily, to the same extent, discredit his confession, which, as already observed, was practically the only evidence the state had upon which to base a conviction. These questions could not have been other than prejudicial to the defendant's case. He was on trial for his life, and the state had introduced in evidence his written and oral confessions, which tended strongly to prove him guilty of murder in the first degree. Section 4162 of the Revised Statutes provides: "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the state prison for life in the discretion of the court." And the jury was so charged. And in Calton v. Utah, 130 U. S. 83, 9 Sup. Ct. Rep. 435, 32 L. ed. 870, on appeal from the territorial supreme court of Utah, it was held reversible error not to so charge the jury. Whatever disposition, if any, there may have been on the part of the jurors to make the said recommendation, may have been entirely overcome and removed by reason of these rulings of the court. There is no settled and arbitrary rule defining the limits within which the cross-examination must be confined. The latitude that may be allowed is largely within the discretion of the trial court, to be exercised and governed by the facts and circumstances of each particular case. The demeanor and appearance of the witness while testifying, the extent and character of his testimony in chief, his inclinations and prejudices, the disposition he has shown to speak or evade the truth, as the

case may be, the interest or lack of interest, if any, he has in the result [50] of the case in which he is called to testify, are matters that will in a measure determine the scope that ought to be allowed on cross-examination. And while, as we have suggested, it is a matter that is almost entirely within the discretion of the court to what extent the cross-examination of a witness may be carried, yet the weight of authority holds that, when a party on trial for a criminal offense testifies in his own behalf, it is an abuse of discretion and is error to permit the state, over his objection, to interrogate him respecting the commission of other crimes by him which are in no way connected with the one for which he is being tried, unless the questions asked relate to some crime or crimes for which he has been convicted, in which case the questions are proper and may be asked. And even in cases of this kind the questions will be permitted for the purpose only of affecting the credibility of the defendant. Now, the questions referred to did not in any degree tend to impeach or discredit any material statement or part of the defendant's testimony, which shows that he went to the car for the purpose of robbery, and with a loaded 44-caliber Colt's revolver, and commanded Gleason and Brighton to throw up their hands; that when he was told by Gleason to put up his hands (and he was thereby put under arrest), he started, with his drawn revolver still in his hands, to back out of the car; that he did not drop his gun, because he needed it; that when he fell, and Gleason and Brighton started toward him, he deliberately fired a shot, which, he says, may have killed Gleason, which shot was fired before he made any attempt to inform the men that "he was willing to give up"; that up to the time he fell nothing was said or done to cause him to abandon the thought of taking the money from those men; that while endeavoring to maim Gleason by shooting him in the arm the gun was prematurely discharged, and instead of hitting Gleason in the arm as intended, may have inflicted the mortal wound of which he died; that after he had mortally wounded Gleason he deliberately and wantonly killed Brighton. The foregoing is a summary of the material facts in the case. Therefore, it is idle to contend that the questions and answers referred to had a tendency, or even were intended, to [51] weaken or impeach the facts upon which the state relied for a conviction (and which are

the only material facts in the case), or, for that matter, any fact or circumstance testified to by the defendant. His declarations to the effect that, at the time he started for the scene of his crime and when he arrived there, he had a mental reservation with respect to killing these men, is no proof whatever of a subsequent abandonment on his part. Neither does his evidence tend to show any such intention, wherein he says: "Q. I mean, when Gleason told you you had better put up your hands yourself, you have testified you immediately dropped your gun and backed up? A. I held the gun down in my hand. I didn't say a word, no, sir, right at that time. Q. You didn't say anything about you were going to give up until they got you cornered, did you? A. I did not. Q. Well, why didn't you drop the gun out of your hand, if you were willing to give up? A. Well, I didn't think it was necessary to drop the gun. The men had made no movement. I did just like any other human being would when I thought I was going to lose my life; I tried to tell them I was willing to give up. Q. Why didn't you drop your gun? A. I am answering your question. If they had said anything I would have dropped the gun. Q. And you didn't voluntarily drop it, or give up the gun? A. I could not under such circumstances, and no other man under God's sun could. Q. You needed it? A. My life depended on it." If this testimony, which is the most favorable to him of any in the record, were entirely eliminated, the record would not show his guilt any more conclusively than it does in its present condition. In the case of People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183, Chief Justice Church speaking for the court says: "I am of the opinion that the cross-examination of the persons who are witnesses in their own behalf when on trial for criminal offenses should in general be limited to matters pertaining to the issues, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction [52] for one offense by proof that the accused may have been guilty of others. Such a result can only be avoided practically by the observance of this rule."

This same doctrine was reaffirmed in a later case by the New York court: People v. Crapo, 76 N. Y. 288, 32 Am. Rep. 302. In that case the defendant was on trial for burglary, and testified as a witness in his own behalf. On cross-ex-

amination he was asked the following question, which was objected to: "Were you also arrested on a charge of bigamy?" This was held to be reversible error. The court, in the course of the opinion, said: "The discretion which courts possess to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility should be exercised with caution when an accused person is a witness in his own trial. He goes upon the witness-stand under a cloud; he stands charged with a criminal offense not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination, every incident of his life and every charge of vice or crime which may have been made against him, and which may have no bearing on the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life."

Underhill, in his work on Criminal Evidence (section 62), says: [53] "To compel the accused to answer indiscriminately to all questions, respecting past criminal transactions, which, though similar, are separate and distinct from that for which he is on trial, would not only be treating him more harshly than other witnesses, but would be a serious infringement of his constitutional privileges": Gulf etc. Ry. Co. v. Johnson, 83 Tex. 628, 19 S. W. 161; State v. Houx, 109 Mo. 654, 32 Am. St. Rep. 686, 19 S. W. 35; Elliot v. Boyles, 31 Pa. St. 65; Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280; Emery v. State, 101 Wis. 627, 78 N. W. 145; State v. Anthony, 6 Idaho, 383, 55 Pac. 884; People v. Un Dong, 106 Cal. 83, 39 Pac. 12; State v. Gleim, 17 Mont. 17, 52 Am. St. Rep. 655, 41 Pac. 998, 31 L. R. A. 294; State v. Huff, 11 Nev. 17; State v. Underwood, 44 La. Ann. 852, 11 South. 277; Gale v. People, 26 Mich. 157; People v. Pinkerton, 79 Mich. 110, 44 N. W. 180; Elliot v. State, 34 Neb. 48, 51 N. W. 315; State v. Saunders, 14 Or. 300, 12 Pac. 441; Bailey v. State, 67 Miss. 333, 7 South. 348; State

v. Carson, 66 Me. 116; Clarke v. State, 78 Ala. 474, 56 Am. Rep. 45; Commonwealth v. Thrasher, 11 Gray, 450.

For the reasons herein stated, the case is reversed, with directions to the trial court to grant a new trial.

Straup, J., concurs.

Chief Justice Bartch Concurred in the judgment of reversal, but not upon the grounds stated in the majority opinion. He expressed the opinion that the city judge had jurisdiction to hold the preliminary examination of the defendant, and that the statute conferring such jurisdiction was not in conflict with the constitutional provision that other judges "may hold preliminary examinations in cases of felony"; citing State v. Lewis, 26 Utah, 120, 7 Pac. 388; Nichols v. Oregon etc. R. R. Co., 28 Utah, 319, 78 Pac. 866; Cooley's Constitutional Limitations, 7th ed., pp. 91-94; 8 Cyc. 730.

He took a different view from his brethren, however, on the question, "Was it incumbent upon the defendant to personally make the objections and claim his privilege from answering the questions asked respecting the commission of other crimes by him, or did he have the right to make objections and claim his privilege and immunity through his counsel?" Answering this question, they held that the action of the court in the premises was prejudicial error, and that counsel could make the objections and claim the privilege for the witness. But he perceived no reversible error in any of these rulings.

On this point he said in part: "It seems almost too clear for argument that under our statute, and the decisions of the courts made under similar statutes, and upon the authority of the text-writers, when the defendant assumed the character of a witness in his own behalf he became subject to cross-examination the same as any ordinary witness, and that the mere fact that he was also defendant conferred upon him no privilege, respecting his answers to criminating or degrading questions, not enjoyed by or applicable to any other witness, there being no statute restricting the right of cross-examination to matters inquired of in the examination in chief. He was not compelled to submit himself as a witness, nor to answer incriminating or degrading questions. Nor did the court coerce him when he claimed his privilege. The answering of such questions in a criminal case is purely a personal privilege of the witness, as hereinbefore stated, and as the authorities, to which reference will be made herein, show; and, in accordance with sound reason under an overwhelming weight of authority, counsel can neither claim the privilege nor waive it for him"; citing Underhill on Criminal Evidence, secs. 60-62; 1 Greenleaf on Evidence, secs. 444b, 449, 469d; Wharton on Criminal Evidence, secs. 323, 430, 432, 433, 465, 473; 3 Rice on Evidence, pp. 296-314; 2 Taylor on Evidence, secs. 1465-1467; Roscoe's Criminal Evidence, secs. 232-234; People v. Hite, 8 Utah, 461, 33 Pac. 254; People v. Larsen, 10 Utah, 143, 37 Pac. 258; People v. Casey, 72 N. Y. 393;

People v. Conroy, 153 N. Y. 174, 47 N. E. 258; People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669; People v. Webster, 139 N. Y. 73, 34 N. E. 730; Brandon v. People, 42 N. Y. 265; Hanoff v. State, 37 Ohio St. 178, 41 Am. Rep. 496; Wilber v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346; Territory v. O'Hare, 1 N. Dak. 30, 44 N. W. 1003; State v. Kent, 5 N. Dak. 516, 67 N. W. 1052, 35 L. R. A. 518; Samuel v. People, 164 Ill. 379, 45 N. E. 728; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; Morgan v. Halberstadt, 60 Fed. 592, 9 C. C. A. 147; 1 Burr's Trial, 244; Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189; Wroe v. State, 20 Ohio St. 460; People v. Clark, 102 N. Y. 735, 8 N. E. 38; People v. Robinson, 86 Mich. 415, 49 N. W. 260; Yankee v. State, 51 Wis. 464, 8 N. W. 276; People v. Foote, 93 Mich. 38, 52 N. W. 1036; Stalcup v. State, 146 Ind. 270, 45 N. E. 334; State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; State v. Merriman, 34 S. C. 576, 13 S. E. 328; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Frank v. State, 94 Wis. 211, 68 N. W. 657; State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; McKeone v. People, 6 Colo. 346; Connors v. People, 50 N. Y. 240; Commonwealth v. Tolliver, 119 Mass. 312; Mitchell v. State, 94 Ala. 68, 10 South. 518; Commonwealth v. Shaw, 4 Cush. 594, 50 Am. Dec. 813; Ingersol v. McWillie, 87 Tex. 647, 30 S. W. 869; State v. Butler, 47 S. C. 25, 24 S. E. 991; Roddy v. Finnegan, 43 Md. 490; Clark v. Reese, 35 Cal. 89; Floyd v. State, 7 Tex. 215; Kirschner v. State, 9 Wis. 140; Thomas v. State, 103 Ind. 419, 2 N. E. 808; Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 115; White v. State, 52 Miss. 216; Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698; State v. Cohn, 9 Nev. 179; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; Paxton v. Douglas, 16 Ves. 239; East v. Chapman, 1 Moody & M. 46; Thomas v. Newton, 1 Moody & M. 244; Fisher v. Ronalds, 12 Com. B. 762; Adams v. Lloyd, 3 Hurl. & N. 351; Parkhurst v. Lowton, 2 Swanst. 216.

He also called attention to section 5015 of the Revised Statutes of 1898, providing: "If a defendant offers himself as a witness he may be cross-examined by the counsel for the state the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him, nor be used against him on the trial or proceeding."

"Here," he said, "is a plain provision of statute authorizing in express terms the counsel for the state to cross-examine such a defendant 'the same as any other witness,' if he offers himself as a witness, yet, in the face of this statute, my brethren draw a distinction, existing neither in sound reason nor in law within this jurisdiction, between a defendant who is a witness and a witness who is not a defendant. As to the latter, they admit that 'the right to refuse to answer incriminating questions is a personal privilege of the witness which he can either exercise or waive,' while, as to the former, they say: 'We do not understand the authorities to hold that when the witness is also the defendant in the case his counsel cannot speak

for him and make the proper objections and protect him in his right and immunity from answering questions on cross-examination respecting the commission by him of other crimes which are in no way connected with the one for which he is on trial.' With due respect for the understanding of my learned brethren thus expressed, I am impelled to say that my examination of the authorities upon this subject has led me to an understanding exactly the opposite—that the authorities, under statutes like or similar to ours, are practically unanimous in holding that when a defendant offers himself as a witness in his case, he is subject to cross-examination the same as any other witness, and that his counsel cannot claim his privilege for him. A very strong reason for this rule is that counsel, in the nature of things, at least in many instances, is not familiar with the facts which induce the question and is not under oath, while the witness, with a knowledge of the facts in his own breast, is sworn and must answer under his oath; and, when such a witness so answers a question upon cross-examination as to a collateral matter, the state is bound by his answer and cannot impeach him.''

On the question of abandonment of his felonious intent by the defendant and his right to self-defense, the chief justice said in part: ''I am of the opinion that the questions of abandonment in good faith by the prisoner of his original felonious purpose, and of retreat ought to have been properly submitted to the jury, and that, under the evidence contained in the record, the court had no right to refuse to submit to the jury the very theory, and the only one, upon which the defense was conducted. Upon this ground only I concur in reversing the judgment.

''The case, as has been seen, was tried by the defense on the theory of self-defense, the defendant claiming that the killing was done to save his own life, in an assault made upon him by the deceased persons after the defendant's iniquitous attempt to commit robbery had been voluntarily abandoned, in good faith, to the knowledge of all the parties to the affray. The defense elicited testimony from its witnesses, including the defendant, which it is claimed tended to establish an abandonment and retreat, and, after the evidence was all admitted, it was for the jury to find the facts, and the court could only consider them, as claimed, for the application of the law to them contingently, if found. This is certainly true where the facts are not admitted, and where, as here, the truth of the testimony is seriously doubted. Therefore, 'Where evidence is offered by either party to prove a certain state of the facts, and the claim is made that they are proved, and the court is requested to charge the jury that the law is as applicable to them, and what verdict to render if they find them proved, the court must comply': Morris v. Platt, 32 Conn. 75; 11 Ency. of Pl. & Pr. 213, 214.

''Weakness of the evidence is no ground for refusal to charge upon it. If there is any evidence, however slight, which supports the hypothesis upon which the request to charge is based, the re-

quest, or an instruction on the court's own motion, should be given: 11 Ency. of Pl. & Pr. 215-217; Riedle v. Mulhausen, 20 Ill. App. 68; Chapman v. McCormick, 86 N. Y. 479; Muldowney v. Illinois Cent. R. R. Co., 32 Iowa, 176; Levy v. Gray, 56 Miss. 318; County of Cook v. Harms, 108 Ill. 151; State v. Levigne, 17 Nev. 435, 30 Pac. 1084; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; People v. Taylor, 36 Cal. 255.

"Although the prisoner shows, by his own evidence, that he is guilty of an attempt to perpetrate a heinous offense, for which, in any event, he is liable to punishment, and while under the law the assailed would have been justified in killing him in his attempt, if necessary to prevent him from accomplishing his criminal purpose, still, if, before completion, he in good faith abandoned his evil design, and his abandonment and retreat were made so obvious by his acts and the circumstances as to clearly advise the assailed that they were no longer in danger of having the attempt renewed, then if thereafter the assailed, not attempting to effect an arrest, made such a fierce attack as to induce in him a well-grounded belief that they intended to kill him, he had a right to use such force as was necessary to save his own life, even to the extent of killing his assailants; and if the jury should find that, at the time of the homicide, such circumstances actually existed, then the prisoner would not be guilty of murder in the first degree, notwithstanding his original criminal assault"; citing 1 Hale's Pleas of the Crown, 479, 480; 4 Blackstone's Commentaries, 134; 1 McLain on Criminal Law, sec. 310; 1 Bishop on Criminal Law, sec. 871; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; People v. Wong Ah Teak, 63 Cal. 544.

"Nor is, in such cases, where the defendant makes the first assault, the right of self-defense limited to cases where there are two or more assaults in the affray"; citing People v. Button, 106 Cal. 628, 16 Am. St. Rep. 259, 39 Pac. 1073, 28 L. R. A. 591; 1 Wharton on Criminal Law, sec. 486; 1 Bishop on Criminal Law, secs. 871-874; 25 Am. & Eng. Ency. of Law, 270, 271; State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754; Parker v. State, 88 Ala. 4, 7 South. 98; State v. Smith, 10 Nev. 106; State v. Cable, 117 Mo. 380, 22 S. W. 953; People v. Robertson, 67 Cal. 646, 8 Pac. 600; State v. Edwards, 112 N. C. 901, 17 S. E. 521.

"It seems that the trial court recognized the fact that the question of abandonment by the defendant of his intent to rob exists in the case, for after defining robbery, and stating the law relating to the right of the person against whom an attempt to rob is made to arrest the robber and prevent his escape, and after stating the consequences which follow when such criminal resists arrest, or attempts to escape, and in so doing injures or kills the person who tries to arrest him or prevent his escape, it charged the jury that 'if the person attempting to perpetrate such robbery in good faith abandons such attempt before the robbery is accomplished, and desists from further prosecuting the same, and when called upon surrenders himself and

makes no effort to escape, the person against whom the attempt is made is not justified in killing or attempting to kill him, or in using more force than is necessary to arrest him or prevent his escape.' While the court thus recognizes and endeavors to charge on the question, there is clearly nothing in this instruction that indicated to the jury what the rights of the defendant were, if they found from the evidence that he had in good faith abandoned his design to rob, before the fatal shooting.''

The Right of Self-defense is discussed in the monographic notes to State v. Sumner, 74 Am. St. Rep. 717-740; State v. Gordon, 109 Am. St. Rep. 804-826. The principal case will be found cited in this last note.

The Privilege of a Witness as to incriminating testimony is discussed in the monographic note to Evans v. O'Connor, 75 Am. St. Rep. 318; and the cross-examination of a defendant in criminal prosecutions is discussed in the monographic notes to State v. Duncan, 38 Am. St. Rep. 895-898. Where the accused offers himself as a witness, he cannot, on cross-examination, it has been held, refuse to answer a question, on the ground that his answer may tend to prove him guilty of some other crime, if the question is one material to the case: People v. Dupounce, 133 Mich. 1, 103 Am. St. Rep. 435.

WASHINGTON ROCK COMPANY v. YOUNG.

[29 Utah, 108, 80 Pac. 382.]

BOUNDARIES—Original Survey Controls.—An original survey of lands, upon the faith of which property rights have been acquired, controls over survey subsequently made which injuriously affect such rights. (p. 669.)

BOUNDARIES—Re-establishment of Lost Corners.—Where the monuments of corners which, if standing, would fix the boundaries of a tract of land, are lost, but the corner monument from which the initial survey was made remains intact, such monument, in the absence of other controlling evidence which will protect the property rights acquired on the faith of that survey and which will be most likely to restore the original lines and monuments, should be resorted to and adopted as the beginning point of subsequent surveys of the same tract. (pp. 669, 670.)

BOUNDARIES—Original Survey Conclusive.—On a resurvey of a tract of land to establish lost boundaries, the original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can definitely be determined, are conclusive, without regard to whether they are located correctly. (p. 670.)

BOUNDARIES.—When an Entry of Public Land is Made in the land office upon the faith of the original government survey, the patent, when issued, relates to the date of the entry and refers to the lines actually run on the ground. (pp. 671, 672.)

Controversy over a lost boundary. The plaintiff is the owner of the northeast quarter of the southeast quarter, and the appellant of the northwest quarter of the southeast quarter, of section 12. The boundary between the two tracts is a stone quarry which, if the line is as claimed by the plaintiff, belongs to the rock company; and if it is as claimed by the appellant, it belongs to him. From a judgment in favor of the plaintiff this appeal is taken.

O. W. Moyle, for the appellant.

Sutherland, Van Cott & Allison and William D. Riter, for the respondent.

[115] BARTCH, C. J. The decisive question in this case is whether at the close of the evidence the court erred in refusing to instruct the jury to return a verdict in favor of the appellant. We understand the contention of the appellant to be that there is no conflict in the evidence as to the material facts which must control in this controversy, that the law applicable to those facts gives him an undoubted right to the thing in dispute, and that therefore the question involved was one of law for the court. A careful examination of the evidence shows this contention to be well founded. More than thirty years [116] ago, as appears by the proof, the patentee made application to the land office to have the land in dispute surveyed, and thereupon Mr. Dickert, as deputy United States mineral surveyor, was instructed by the surveyor general to make the survey. Pursuant to such instructions, Mr. Dickert surveyed all the lines and set all the corner monuments necessary to segregate the land referred to by the application from the public domain. That is admittedly the original survey, in so far as the land in controversy is concerned. After doing some preliminary surveying, he found a rock monument at point A, a quarter section corner previously set by Mr. Burr. From this point he ran east on a true line, giving each mile eighty chains, and established the southeast corner of section 11 at B, the quarter section corner at C, and the southeast corner of section 12 at E, which section embraces the land in question. He also established the corners at F, X, and Y, and all the intermediate corners, including K, H, I, and G, but he did not establish the corner at Z. All these corners are represented

on the diagram appearing in the statement of facts. At this time the township line on the east side of section 12 had not yet been surveyed. On this survey the entry of the appellant's land was made and the patent issued, and it included the land upon which the stone quarry is located. About two years later Mr. Ferron made a survey of the east boundary line of section 12. He commenced his survey from a point about four miles below E, and ran a random line north to E; but whether or not he found the monument set at E by Mr. Dickert does not satisfactorily appear from the evidence, which simply shows that he ran a line between certain "townships to the corner of sections 7, 12, 13, and 18," without direct reference to a monument. From point E, to which he so ran, he proceeded north to W, and thence north, and established the northeast corner of section 12 at Z. Some time later Mr. Pancake made his survey of the north, west, and south boundaries of section 12. In order to re-establish the lost corner at B, the southwest corner of section 12, he also began the survey at a point four miles south on the south boundary of the township, [117] and then from B proceeded to re-establish the other lost corners and lines necessary to locate the appellant's land. In establishing the lost corners and lines, as will be observed, neither Mr. Ferron nor Mr. Pancake followed the survey of Mr. Dickert. They evidently paid no attention to the corner at point A, although the monument at that corner remains still at the place where it was set by the original survey. Instead of retracing the original survey from an original known corner with the aid of the field-notes, they chose to commence at a point in an entirely different direction from E, four miles therefrom, and then from such point, disregarding almost wholly the original survey, attempted to re-establish the lost corners and lines. The lost monuments thus re-established, it appears, controlled in the survey of Mr. Anderson, the respondent's surveyor, whereby the stone quarry in dispute was transferred from the appellant's land to that of the respondent by locating the boundary line between the two tracts on the west side of the quarry. The corner at Z, though not established until several years after the original survey was made, he assumed to be correct, instead of the one at A, and thus made the survey, with the result indicated. He says, "Either the point A or Z

is wrong," and assumes A to be wrong, although the corner at A was established by the first survey, and yet remains in the same place. By doing so, he not only disregarded point A, the solemn witness of the original survey, but also the field-notes, which show the courses and distances of that survey from that corner, in violation of the principle that, where the monuments and lines of an original survey are lost, the field-notes of such survey, and the courses and distances shown by them, may be resorted to, as the best evidence remaining, in re-establishing such monuments and lines. The fact, if it be a fact, that if the Dickert survey be retraced by aid of the courses and distances given in the field-notes, it places the corner at E, some distance east of the township line, into another township, can make no difference, under the circumstances disclosed by the proof respecting lost corners and lines. Such fact, if it be a fact, cannot injuriously affect the [118] rights of the appellant acquired by entry based upon a survey made before the township line was located. If by the original survey the corner at E was set east of where the township line was afterward located, subsequent surveyors had no right to place it anywhere else. The law is well settled that an original survey of lands, upon the faith of which property rights have been based and acquired, controls over surveys subsequently made which injuriously affects such rights.

The witness Anderson admits the binding effect of an original survey, and yet in practice he disregarded the very evidence which would admittedly have enabled him to re-establish the lost lines and corners without interference with property rights acquired on the faith of an original authorized government survey, for he admitted in his testimony that if he had commenced his survey at point A, and followed the field-notes of Mr. Dickert, the quarry would be in the appellant's land. That this is true is clear from the survey of Mr. Hardy, who started from point A, and recognized the field-notes of the Dickert survey. His survey appears to be a compliance with the rules of law governing such a case. Where the monuments of corners, which, if standing, would fix the boundaries of a tract of land, are lost, as in this instance, but the corner monument, from which the initial survey was made, remains intact, such monument, in the absence of other controlling

evidence of the original survey which will protect the property rights acquired on the faith of that survey, and which will be more likely to restore the original lines and monuments, should be resorted to and adopted as the beginning point of subsequent surveys of the same tract of land. From that point the original survey should be retraced, and the monuments re-established, with the aid of the courses and distances contained in the field-notes of the first survey. "Original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive, without regard [119] to whether they were located correctly or not": 5 Cyc. 873.

In reference to the powers and duties of commissioners and processioners under appointment to establish lost boundaries, it is said: "The powers of commissioners and processioners extend only to locating and establishing lost or doubtful boundaries, and they can in no event disturb title or rights of possession or establish new lines. In doing this they must follow the mode prescribed by the order or decree of appointment, and from a known and established corner or monument should run out the lines by course and distance according to their original location. They are at liberty, however, to survey whatever lines may be necessary in order to find and establish the true location of the line in dispute": 5 Cyc. 946; Martz v. Williams, 67 Ill. 306.

This applies with equal force to subsequent surveyors appointed to re-establish lost lines and corners. Such surveyors may also, in all cases of this character, consider other extrinsic material evidence, as well as the field-notes, for the purpose of determining the exact location of the lost lines and corners of the original survey; and, wherever corner monuments of that survey can be found in place, they must control over the courses and distances indicated by the field-notes, and over any other calls in such notes. This is a binding rule. But "before the rule that monuments control courses and distances can apply, there must be actual, fixed monuments, and the places where they were at the time the deed was made must be determined": 4 Am. & Eng. Ency. of Law, 769. In Hess v. Meyer, 73 Mich. 259, 41 N. W. 422, it was said: "If the stakes or monuments placed by the government, in making the sur-

vey, to indicate the section corners and quarter posts, can be found, or [120] the places where they originally were placed can be identified, they are to control in all cases. When they cannot be found, or if lost or obliterated, they must be restored upon the best evidence obtainable which tends to prove where they originally were. For this purpose surveys are made, and the lines retraced as near as possible."

In such cases junior or subsequent surveys are not made to dispute the correctness of or to control the original survey, but to furnish legitimate proof of where the lost lines or monuments were, so as to aid the jury in determining the exact location of the original survey. It seems clear, therefore, that in making such junior surveys the original survey should be retraced, when possible. In this instance there appears to be disclosed by the record no good reason why the subsequent surveyors disregarded point A and the field-notes, went over four miles from point E for a starting point, and made practically a new survey, instead of retracing the old one. An original survey, upon which property rights have been acquired, cannot thus be changed or diminished or obliterated, with so little regard for existing evidence. In Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. Rep. 907, 31 L. ed. 721, it was said: "It is unquestionably true that a junior survey cannot control or enlarge the dimensions of a senior survey. We understand this to mean that, when the location of a survey is or can be ascertained or determined by its own marks upon the ground—its own calls and courses and distances—it cannot be changed or controlled or enlarged or diminished by the marks or lines of an adjoining junior survey; but when, from the disappearance of these original landmarks, caused by time and other agencies, from the senior survey, the location of a particular line or the identity of a corner is left in uncertainty or becomes the subject of controversy, then the original [121] and well-established marks found upon a later survey made by the same surveyor about the same time, and adjoining the one in dispute, are regarded as legitimate evidence, not to contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering the exact location of the older survey": 1 Dembitz on Land Titles, sec. 4; 5 Cyc. 874, 875; 4 Am. & Eng. Ency. of Law, 787; Goodman v. Myrick, 5

Or. 65; Payne v. English, 79 Cal. 540, 21 Pac. 952; Irvin v. Rotramel, 68 Ill. 11; Clement v. Northumberland Coal Co., 87 Pa. St. 291; Hubbard v. Dusy, 80 Cal. 281, 22 Pac. 214; Nesselroad v. Parrish, 59 Iowa, 570, 13 N. W. 746; Billingsley v. Bates, 30 Ala. 376, 66 Am. Dec. 126.

The fact that the date of the appellant's patent is not in evidence does not militate against the position that it was based upon, and issued with reference to, the original survey. The entry was made in the land office upon the faith of that survey, and when the patent was issued it related back to the date of the entry. A patent granted by the United States is always preceded by a survey, and is understood to refer to the lines actually run on the ground: 1 Dembitz on Land Titles, sec. 4; Flint etc. Ry. Co. v. Gordon, 41 Mich. 420, 2 N. W. 648; French v. Spencer, 21 How. (U. S.) 228, 16 L. ed. 97; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Stark v. Starr, 6 Wall. 402, 18 L. ed. 925.

Having thus concluded that the court, under the facts in evidence, ought to have instructed the jury to return a verdict in favor of the appellant, it is unnecessary to decide any other question presented.

The case must be reversed, with costs, and remanded for further proceedings in accordance herewith. It is so ordered.

McCarty, J., concurs.

STRAUP, J., Concurring. [122] I concur in the reversal of the judgment, but I do not concur upon the ground that the trial court was authorized to direct a verdict.

Point A on the plat in the opinion of the majority court was established by Burr, deputy United States surveyor, in 1856, when making a partial survey of section 11. In 1881 Dickert, deputy United States surveyor, made a partial survey of section 12, and established point E on the township line as the southeast corner of section 12, and one-half mile north thereof, on the township line, established point F. Then running north from point C and D he established points G, H, I, and K, marking the boundary between the quarter sections in dispute. Monuments were placed by him at all these points. In 1884 Ferron, deputy United States surveyor, made a survey starting on the township line "four miles below point E, and came

north to E, which monument he found still standing. Running due north from E one-half mile, he found monument F standing, and ran due north another one-half mile, and established monument Z." Still later, but in 1884, Pancake, deputy United States surveyor, surveyed and established the north, west, and south boundaries of section 12. He also found monument E, established by Dickert, but did not find C, B, or A, and so re-established them. He did not find M, X, or Y, and established those; but he did find Z, established by Ferron. So that we have monument E placed and established by Dickert as the southeast corner of section 12, found by both Ferron and Pancake, and "the corner Z was set from the corner set by Mr. Dickert; that is, he [Ferron] started at the point E, and ran due north one mile and set the corner Z." Not only is there evidence to show that the two corners, Z and A, disagree with the calls in the notes, but also that A or E is wrong. E was supposed to be placed by Dickert on the township line, just where it was found by both Ferron and Pancake; but, taking A as the controlling point, and going one and one-half miles east of A, the east boundary line of section 12 would be one hundred and seventy-one feet in another township.

All the monuments except A, X, and Z are obliterated. [123] The ultimate fact sought to be established at the trial was, Where had Dicker placed the monuments, all of which are obliterated, marking the boundary between the quarter sections in dispute? It is conceded, and it is the law, that wherever he placed them, that became the actual boundary line, no matter whether it was accurate or not. But the majority court, in effect, have held that the finding of the lost monuments marking such boundary is to be determined by starting at the point A, where Dickert started, and, by following the course and distance of his field-notes, the lost monuments should be established at whatever place these notes lead. In other words, the majority court, in effect, have declared not only that the field-notes of the original survey are competent evidence to establish lost monuments, which I concede, but that they are conclusive evidence thereon, which I do not concede, but with which I disagree. There is no case cited holding that the field-notes of the original survey are conclusive evidence to establish lost monuments. What courts have said is, wher-

ever the corners were placed by the original government survey, that must govern as the boundary line, no matter whether accurate or not, and cannot be altered or controlled by subsequent surveys. When, however, the corners become lost or the monuments obliterated, the cases are quite harmonious that: "It is for the jury to ascertain and settle at what precise point the disputed or lost corner was placed, and the disputed line marked, by the government surveyor in his original survey. And to enable the jury to perform that duty intelligently, any evidence, whether parol or written, may be submitted to them, which has any natural and reasonable tendency to show where that corner was placed or that line marked in the original survey. Recourse may be had to the unobliterated marks and corners of that survey, to the field-notes and plat, and to subsequent surveys made under their guidance. Such subsequent surveys cannot alter or control that survey, for so far as it can be traced or proved, it [124] must govern. But still they may aid the jury in ascertaining the original position of the lost corner. With their aid the jury may be enabled to ascertain with reasonable certainty where the lost corner was located in the original survey. Without their aid the jury may not be able to ascertain that location. Their weight or influence as evidence must be determined by the jury. The mere fact that the party relying on them has not proved that they correspond in all respects with the original government survey does not authorize the court to instruct the jury to disregard them entirely in seeking the location of the lost corner or line. The party cannot in any case prove such correspondent without proving every part of that survey. In many cases he cannot prove a lost corner, or any other lost part of the survey, without the aid of such subsequent surveys. And in all such cases a rule which requires, as a condition for obtaining any influence for them, that the party relying on them should prove their correspondence in all respects with the original survey, would amount to a denial of the right to prove the location of a lost corner or other lost part of the original survey. There is no such rule. The jury ought to consider such subsequent surveys in connection with the other evidence in the cause, and if, after doing so, they believe that the original location of the lost corner was at a particular point, designated

with reasonable certainty by the evidence, such belief ought not to be disregarded in making up their verdict'': Billingsley v. Bates, 30 Ala. 376, 68 Am. Dec. 126.

When the cases cited by the majority court are read, the above is all that is maintained by them. The error of the majority court in holding that the only and conclusive procedure to establish lost corners is to retrace the lines of the original survey is fully pointed out and answered by the following cases: Moreland v. Page, 2 Iowa, 139, vol. 2, [125] Cole's ed.; McClintock v. Rogers, 11 Ill. 279; Martz v. Williams, 67 Ill. 306; Miller v. Topeka Land Co., 44 Kan. 354, 24 Pac. 420. The rule of law as recognized by these cases, as well as by the cases cited by the majority court, is to the effect that, where corners become lost or monuments obliterated, boundaries may be proved not only by field-notes, but by surveys, records, and certificates, maps and plats, testimony of witnesses, and other evidence admissible to establish the controverted fact, not for the purpose of altering or correcting the original survey as made, but for the purpose of determining where, as a matter of fact, the monuments were originally placed by the original government survey; and the determination of this fact is one for the jury, under proper instructions from the court: 5 Cyc. 956-972.

Here there was evidence to show that point Z was established one mile due north from the point E, as established by Dickert—the so-called original survey. Monument E is now gone. The question is, Where was it originally placed by Dickert? The majority court say the only and conclusive way to determine such fact is to start at the point A, where Dickert started, and run east one and one-half miles. But inasmuch as Z was run one mile due north from E, as established by Dickert, why is it not evidence proving where E originally was by running one mile due south from Z, which still stands, and is a witness as to where E was? And starting from the point Z, or starting from the point E, the rock quarry in dispute would be in the quarter section owned by respondent. And according to the surveys made by Ferron, Pancake, and Anderson, and evidence of other witnesses, the lost monuments, as esta lished by the original survey, would have been found at such place as to give the rock quarry to the respondent. It may be that this evidence was not so con-

vincing and was not of so great a weight as was the evidence retracing the field-notes of the original survey. But, as the authorities say, this was mere matter of weight for the jury. Suppose it had been shown by oral testimony from persons who saw placed the original monuments (now obliterated), or who saw them thereafter in place, and were [126] able to identify the exact place; could it be said that such evidence cannot be considered to determine where the monuments were originally placed, but that it must give way to wherever the field-notes of the original survey by course and distance would place the monuments? Here it is not claimed or pretended that the surveys and the evidence of respondent's witnesses was not competent evidence tending to prove where the lost monuments were originally placed. And if it was competent evidence, and tended to prove, as it did, that the rock quarry was in the quarter section of respondent, on what principle of law shall it now be declared that the trial court should have wholly disregarded such evidence, and directed a verdict for appellant? The only answer to it is that the field-notes of the original survey are conclusive, and that the lost monuments should have been established by starting at point A, where Dickert started, and following to whatever point or points the notes, in their course and distance, lead, and that all other evidence of a different nature proving lost monuments and establishing boundary is incompetent.

I am, however, of the opinion that the court erred in refusing to give appellant's request No. 4, which is as follows: "You are instructed that if you find from the evidence that the original corners of section 12, as made by the surveyor, Mr. Dickert, have been torn down or destroyed, or cannot now be found, then it is your duty to ascertain from the evidence, as nearly as possible, where the said original lines and corners were that are in dispute, and it makes no difference whether or not said original lines and corners are exactly where they should have been if the survey had been perfectly made." The following charge, which the court gave, was not the substance of said request: "You are instructed that the true corners and boundary lines of townships, sections, and subdivisions of sections are where the government surveyors in fact established them on the ground. Evidence of surveys made

by various civil engineers has been introduced in this case. Such evidence was admitted for the purpose of assisting you in determining the true location of [127] the boundary line in dispute, and it is your duty to determine from all the evidence where the line between the northeast quarter of the southeast quarter and the northwest quarter of the southeast quarter of section 12 is located upon the ground according to the government survey, and in which of said forty-acre tracts the stone quarry in controversy is located." The evidence shows that there was several government surveys made by several different government surveyors at different times. The instruction states that "the true corners and boundary lines," etc., "are where the government surveyors in fact established them on the ground." At the time of and by the original survey, or at some subsequent time, and by another survey? The phrases "government surveyors" and "according to the government survey" are not sufficiently specific in this regard. By this charge the attention of the jury was not sufficiently directed to the fact, as was done by the request, that the lines and corners, as originally made and placed, must control, whether accurate or not.

CONCLUSIVENESS OF ESTABLISHED BOUNDARIES.

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 - **1. Conclusiveness in General, 677.**
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I. Surveys Made by Public Authority.

a. Lines Run by United States Surveyors.

1. Conclusiveness in General.—When public land has been surveyed by authority of the United States, and patented with reference to the boundaries as fixed by such surveys, the corners and lines so established, whether correct or not, are conclusive and cannot be altered or controlled by other surveys: Billingsley v. Bates, 30 Ala.

376, 68 Am. Dec. 126; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135; Mayor etc. of Liberty v. Burns, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728; Granby Min. etc. Co. v. Davis, 156 Mo. 422, 57 S. W. 126; Arneson v. Spawn, 2 S. Dak. 269, 39 Am. St. Rep. 783, 49 N. W. 1066; Goodman v. Myrick, 5 Or. 65; Jones v. Kimble, 19 Wis. 429. "The United States government surveys of public lands are undoubtedly conclusive upon all persons owning or holding with reference thereto, and corners and monument so established cannot be altered, whether properly placed or not, and must remain, when ascertained, the true corners or monuments by which to determine the boundaries": Trinwith v. Smith, 42 Or. 239, 70 Pac. 816.

On the sale of land in sections or subdivisions thereof, according to the government survey, the survey as actually made and run on the ground governs, if the monuments, corners, or lines actually established can be located or proved: Miller v. White, 23 Fla. 301, 2 South. 614; Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep 139, 14 South. 805. The true corner of a governmental subdivision of land is where the United States surveys in fact establish it, whether such location is right or wrong, as may be shown by a subsequent survey: Nesselrode v. Parrish, 59 Iowa, 570, 13 N. W. 746; Beardsley v. Crane, 52 Minn. 537, 54 N. W. 740. The question is not where the government corner should have been located, but where in fact it was located. And when it is once found, or the place of its location identified, it must control: Doolittle v. Bailey, 85 Iowa, 398, 52 N. W. 337.

In the construction of a deed escribing land by government survey, the corners of the survey as actually established, not as they should have been established, are the true corners, notwithstanding their location may not be such as is designated in the plat or field-notes: Greer v Squire, 9 Wash. 359, 37 Pac. 545, citing Campbell v. Clark, 8 Mo. 553; Martin v. Carlin, 19 Wis. 454, 88 Am. Dec. 696; McEvoy v. Loyd, 31 Wis. 142. And if a deed describes the land conveyed by adopting the corner of a subdivision according to the United States survey, as a starting point, such corner is a monument and will control, although the grantor, at the time of the sale, by an actual survey, fixed the stake at a different point and run the lines accordingly: Powers v. Jackson, 50 Cal. 429.

"The boundaries, as established by the government surveyors and returned to and accepted by the government, are unchangeable, and control the description of the lands patented. And it is well settled that mistakes in the surveys cannot be corrected by the judicial department of the government": Chan v. Brandt, 45 Minn. 93, 47 N. W. 461. "That the power to make and correct surveys of the public lands belongs to the political department of the government, and that, while the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar

corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. The reason of this rule is that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of the public lands could do": Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. Rep. 203, 32 L. ed. 566.

2. **Purpose of Resurveys.**—If the stakes or monuments placed by the government in making a survey to indicate section corners and quarter posts can be found, or the place where they originally were can be identified, they are to control in all cases. If they cannot be found, or if lost or obliterated, they must be restored upon the best evidence obtainable which tends to prove where they were originally. It is for this purpose that resurveys are made, and the lines retraced as nearly as possible: Hess v. Meyer, 73 Pac. 259, 41 N. W. 422. See, too, the principal case, ante, p. 666. As to the manner of procedure in locating lost corners by another survey, see O'Hara v. O'Brien, 107 Cal. 309, 40 Pac. 423; Hess v. Meyer, 73 Mich. 259, 41 N. W. 422; Trinwith v. Smith, 42 Or. 239, 70 Pac. 816; Hanson v. Township of Red Rock, 4 S. Dak. 358, 57 N. W. 11; the principal case, ante, p. 666. A resurvey must follow the boundaries and monuments as run by the original survey by the United States government, provided the monuments can be found or their place of original location can be identified: Randall v. Burk Township, 9 S. Dak. 527, 70 N. W. 837. A new survey wil not prevail, as to the location of quarter section corners, over the direct testimony of witnesses who saw the corners as located by the original survey: Mills v. Penny, 74 Iowa, 172, 7 Am. St. Rep. 474, 37 N. W. 135.

3. **Effect of Agreement or Acquiescence.**—Although the government surveys should control when they are ascertainable, nevertheless, where parties agree upon other division lines, or where they acquiesce in other established boundaries for a period of time not less than the time prescribed by the statute of limitations, such lines, thus practically located, may become conclusive of the location of the true boundaries: Cox v. Daugherty, 62 Ark. 629, 36 S. W. 184; Yates v. Shaw, 24 Ill. 367; Husted v. Willoughby, 117 Mich. 56, 75 N. W. 279; Clark v. Thornburg, 66 Neb. 717, 92 N. W. 1056. There is language in the case of Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386, however, which, perhaps, may be interpreted as contrary to the foregoing statement. But "there is nothing about government surveys entitling them to reverence. That they abound in mistakes is notorious, and is evidenced in the reported decisions of nearly every state save the original thirteen. Nor are the ordinary surveyors quite infallible. Their successive surveys nearly always disagree. Reference is had to the government survey as pointing out the lines by which the lands described in the patents passed from the

government, and by which they are ordinarily transferred by deeds. But if the coterminous owners have adopted another line as their division line, and have occupied up to it and recognized it as such for a period of ten years, there appears to be no reason for not regarding it as the true boundary, notwithstanding it is not by the government survey": Miller v. Mills County, 111 Iowa, 654, 82 N. W. 1038.

b. Lines Run by Municipal Surveyors.—A survey of private lands in a manner prescribed by the statutes of Indiana does not determine the title to real estate, but is merely prima facie evidence in favor of the lines run and corners established; and the owner of land who causes or submits to such a survey is not estopped from claiming title to his property, where the time for an appeal has not expired: Russell v. Senior, 118 Ind. 520, 21 N. E. 292; Wood v. Kuper, 150 Ind. 622, 50 N. E. 755. And if a survey made pursuant to such statutes is conclusive between adjoining owners, unless an appeal is taken, the conclusive effect may be waived by an agreement between them or a new survey: Spacy v. Evans (Ind.), 48 N. E. 355. Where there is a dispute between the owners of adjoining lands, and a county surveyor establishes a line upon an actual survey of the lands, and both claimants participate in making and paying the expenses of the survey, which survey is acquiesced in for considerable length of time thereafter, it will not be disturbed because a new survey, made some years subsequently, tends to show a mistake in the establishment of the line: Benson v. Daly, 38 Neb. 155, 56 N. W. 788.

II. Surveys by Private Authority or Agreement.

If adjoining land owners who are in dispute or in ignorance as to the true location of their division line employ a surveyor to run the line and ascertain the boundary between their properties, they are not, in the absence of special circumstances, concluded by his survey. Their agreement does not constitute him the arbiter of their differences, and the transaction does not amount to a submission of the question to arbitration: Spring v. Hewston, 52 Cal. 442; Thayer v. Bacon, 85 Mass. (3 Allen) 163, 80 Am. Dec. 59; Cronin v. Gore, 38 Mich. 381; Turner Falls Lumber Co. v. Burnes, 71 Vt. 354, 45 Atl. 896. Property owners may agree, however, that a survey shall establish their division line, and when they thus make the surveyor arbiter, they are bound by the line which he establishes: Hobbs v. Cram, 22 N. H. 130. And when they acquiesce for many years in a boundary established by a surveyor employed by them, they may be concluded from questioning the correctness of the boundary so established: Barnes v. Allison, 166 Mo. 96, 65 S. W. 781; Russell v. Maloney, 39 Vt. 579, 94 Am. Dec. 358; Boyd v. Graves, 17 U. S. (4 Wheat.) 513, 4 L. ed. 628. If there is nothing more than a mere acquiescence, however, perhaps the parties will not be bound short of the statutory period of limitations: Sanford v. McDonald, 53

Hun, 263, 6 N. Y. Supp. 613; Buchanan v. Ashdown, 71 Hun, 327, 24 N. Y. Supp. 1122.

An agreement between owners of adjoining lands to employ a common agent or surveyor to run a line and set up a boundary between them, when the dividing line is susceptible of being correctly located, does not estop either of them, or their grantees, from showing an error in such line: Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139, 14 South. 805. And perhaps the owners of adjoining lands between whom there is no dispute as to the location of their boundary line, but who are ignorant as to its true location, for which reason they employ a surveyor to locate it, are not bound by his location thereof, if incorrect, although subsequently they acquiesce in it, believing it to be correct: Pickett v Nelson, 79 Wis. 9, 47 N. W. 936.

III. Resurveys and Their Purpose and Effect.

It is a matter of common knowledge that the great majority of original surveys are more or less inaccurate. After they have been acted upon, however, and property rights acquired in reliance thereon, subsequent surveys which may be made are not for the purpose of correcting the original ones, but for the purpose of ascertaining the lines, whether actually erroneous or not, originally run, and resurveys are of no effect as evidence except as they tend to determine this question: Trotter v. Stayton, 41 Or. 117, 68 Pac. 3. In Diehl v. Zanger, 39 Mich. 601, where the first survey of lots involved in litigation was made by one Campau, and a resurvey made years afterward by the city surveyor showed that the practical location of the whole plat was wrong, it was declared that a resurvey, made after the disappearance of the monuments of the original survey, is for the purpose of determining where they were, and not where they should have been, and that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. "Nothing is better understood," said Justice Cooley in delivering the opinion of the court, "than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The [city] surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. . . . The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and when those were discovered they must govern. If they are no longer

discoverable, the question is where they were located; and upon that question the best possible evidence is usually found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known: Stewart v. Carleton, 31 Mich. 270. As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are." This decision was approved in Flynn v. Glenny, 51 Mich. 580, 17 N. W. 65.

In discussing this question in City of Racine v. Emerson, 85 Wis. 80, 39 Am. St. Rep. 819, 55 N. W. 177, Justice Orton said: "The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and the greater number of surveys, the greater number of differences and disagreements will occur. When two surveys disagree, the correct one cannot be determined by still another survey. It follows that resurveys are of very little use in such a case as this except to confuse it. In Miner v. Brader, 65 Wis. 537, 27 N. W. 313, there were two surveys, and they disagreed; and the court had to resort to the evidence of a practical location of the lines by monuments. Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are none such, then stakes set by the surveyor to indicate corners of lots or blocks or the lines of streets at the time, or soon thereafter, are the next best evidence. The building of a fence or building according to such stakes while they were present, become monuments after such stakes have been removed or disappeared, and the next best evidence of the true line."

IV. Practical Location by Parties.

a. In General.—When questions arise as to the true location of a boundary line, a practical location thereof by the persons interested becomes of the highest importance. It is a well-settled rule of law, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long period of years will not be disturbed. It is binding on the parties thereto and their privies in estate. This doctrine has been adopted as a rule of repose with a view of quieting titles and preventing litigation: McGee v. Stone, 9 Cal. 600; Dupont v. Starring, 42 Mich. 492, 4 N. W. 190; Smith v. State, 23 N. J. L. 130; Laverty v. Moore, 33 N. Y. 658; Sherman v. Kane, 86 N. Y. 57; Katz v. Kaiser, 154 N. Y. 294, 48 N. E. 532; O'Donnell v. Penney, 17 R. I. 164, 20 Atl. 305. It does not necessarily rest upon an actual agreement nor upon prescription or legal limitation: Haring v. Van Houten, 22 N. J. L. 61.

It has been said that the practical location of a boundary can be established in one of three ways only: 1. The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of action under the statute of limitations; 2. The line must

have been expressly agreed upon by the interested parties, and afterward acquiesced in; 3. The party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the other party encroached thereon, and subjected himself to expense which he would not have done had the line been in dispute: Benz v. St. Paul, 89 Minn. 31, 93 N. W. 1038.

b. **In Case of Formal Agreement.**—Where the division line between adjoining land owners is in doubt or dispute, and they expressly agree to abide by a certain line as a boundary, and the agreement is executed or acquiesced in, the boundary thus established becomes binding upon the parties and their successors in interest, notwithstanding it may vary from the true line of division: Cox v. Daugherty, 62 Ark. 629, 36 S. W. 184; Thaxter v. Inglis, 121 Cal. 593, 54 Pac. 86; Steinhilber v. Holmes, 68 Kan. 607, 75 Pac. 1019; Gardner v. White, 24 Ky. Law Rep. 2444, 74 S. W. 206; Brown v. Bowerman, 134 Mich. 695, 97 N. W. 352; Atchison v. Pease, 96 Mo. 566, 10 S. W. 159; Smith v. McCorkle, 105 Mo. 135, 16 S. W. 602; Lynch v. Egan, 67 Neb. 541, 93 N. W. 775; Hitchcock v. Libby, 70 N. H. 399, 47 Atl. 269; Neubert v. Phillips, 46 Ohio St. 559, 24 N. E. 596; Thiessen v. Worthington, 41 Or. 145, 68 Pac. 424; Eddie v. Tinnin, 7 Tex. Civ. App. 371, 26 S. W. 732. Such contracts may rest in parol, for they do not operate as a conveyance of land, but merely as an agreement in respect to what already has been conveyed: See the monographic note to McCoy v. McCoy, 102 Am. St. Rep. 246. And the period of acquiescence in the newly established boundary, whether the contract be written or verbal, need not be for the statutory period of limitations. The parties will be precluded from questioning the new line, although the possession taken and held in recognition thereof is not of sufficient duration to convey title by prescription: Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139, 14 South. 805; City of Bloomington v. Bloomington Cemetery Assn., 126 Ill 221, 18 N. E. 298; Saint Bede College v. Weber, 168 Ill. 324, 48 N. E. 165; Smith v. Hamilton, 20 Mich. 433, 4 Am. Rep. 398; Jones v. Pashby, 67 Mich. 459, 11 Am. St. Rep. 598, 35 N. W. 152; Pittsburgh etc. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395. In truth, long acquiescence is not necessary to make the agreement binding: Bailey v. Baker, 4 Tex. Civ. App. 395, 23 S. W. 454. The parties must, however, if they would ask the courts to enforce their agreement, conform to it, and not by a course of conduct ignore or disregard the line as established: Brummell v. Harris, 162 Mo. 397, 63 S. W. 497.

c. **In Absence of Formal Agreement.**—No formal or express agreement, however, is essential to the practical location of a boundary. An adjustment may be shown, as well by circumstances and recognition, as by direct evidence of a formal agreement: Hubbard v. Stearns, 86 Ill. 35; Ernsting v. Gleason, 137 Mo. 594, 39 S. W. 70; Galbraith v. Lunsford, 87 Tex. 89, 9 S. W. 365, 1 L. R. A. 522. "The mere acquiescence by adjoining owners," to quote from Justice Cassoday,

in Pickett v. Nelson, 71 Wis. 542, 37 N. W. 836, "through mutual ignorance and mistake, in a supposed dividing line, and the building of a fence thereon, is not conclusive upon the parties: Hass v. Plantz, 56 Wis. 105, 43 Am. Rep. 699, 14 N. W. 65; Hacker v. Horlemus, 69 Wis. 220, 34 N. W. 125. But this does not prevent such parties, when the location of the true line is in dispute or uncertain, or knowingly unascertained, from binding themselves by mutual agreement, either alone or through the agency of a surveyor, as to what should constitute the true location of such line: Vosburgh v. Teator, 32 N. Y. 561; Tobey v. Secor, 60 Wis. 310, 19 N. W. 99. We do not wish to be understood, however, as holding that parties can bind themselves, in such cases of disputed, uncertain, or unascertained location, by express contract only. On the contrary, we think that, where such location is made by the parties concerned with the obvious intention of making it the permanent line between them, and the same is continued by long acquiescence and regulation in the making of paramount improvements, it will be binding upon such parties without any formal agreement. In other words, the conclusiveness of such location may, in certain cases, rest upon the doctrine of estoppel in pais, rather than upon contract. The same is true respecting those claiming under such parties."

d. By Acquiescence in Fixed Line.—In fact, there can be no doubt, as a general rule, that where the owners of adjoining lands occupy their respective premises up to a certain line which they recognize and acquiesce in as their boundary line for a long period of time, they and their grantees will not be permitted to deny that the boundary thus recognized is not the true line of division between their properties, especially when such possession has been accompanied by valuable improvements: Perry v. Pratt, 31 Conn. 433; Raymond v. Nash, 57 Conn. 447, 18 Atl. 714; Lowndes v. Wicks, 69 Conn. 15, 36 Atl. 1072; Ivey v. Cowart, 124 Ga. 159, ante, p. 160, 52 S. E. 436; Idaho Land Co. v. Parsons, 3 Idaho, 450, 31 Pac. 791; Pitts v. Looby, 46 Ill. App. 54; Wingler v. Simpson, 93 Ind. 201; Dyer v. Eldridge, 136 Ind. 654, 36 N. E. 522; O'Callaghan v. Whisenand, 119 Iowa, 566, 93 N. W. 579; Robards v. Rogers (Ky.), 48 S. W. 154; Berry v. Evans (Ky.), 89 S. W. 12; Stockham v. Browning, 18 N. J. Eq. 390; Reed v. Farr, 35 N. Y. 113; People v. Hall, 43 Misc. Rep. 117, 88 N. Y. Supp. 276; Wardlow v. Harmon (Tex. Civ. App.) 45 S. W. 828; Larsen v. Oncsite, 21 Utah, 38, 59 Pac. 234; Brown v. Edson, 23 Vt. 435; Sheldon v. Perkins, 37 Vt. 550; In re Seattle Tide Lands, 19 Wash. 298, 53 Pac. 341; Mays v. Hinchman, 57 W. Va. 602, 50 S. E. 823. The location, however, must be actual, and the acquiescence mutual: Corning v. Troy Iron etc. Co., 6 How. Pr. 89.

If adjoining owners run and mark out a line as the boundary between their properties, and thereafter act upon and acquiesce in such line for many years, it becomes binding upon them, although it varies from the true boundary or the course given in the deed: Faught v. Holway, 50 Me. 24; Knowles v. Toothaker, 58 Me. 172;

Kellogg v. Smith, 61 Mass. (7 Cush.) 375; Hathaway v. Evans, 10[illegible] Mass. 267; Bunce v. Bidwell, 43 Mich. 542, 5 N. W. 1023; Lemons v. McKinney, 162 Mo. 525, 63 S. W. 92; Culberston v. Duncan (Pa. St.), 13 Atl. 966; Browning's Exr. v. Atkinson, 46 Tex. 605. This rule is applied in Castleman v. Trustees of School Dist., 24 Ky. Law Rep. 88, 68 S. W. 17, to a boundary line marked off between school districts.

If a fence has been built or a hedge has been set out as a boundary, and thereafter has been recognized as the true boundary by adjoining owners for many years; or if a fence already erected is maintained and treated and occupied up to as their line of division for a long period of time, they cannot, as a rule, question the correctness of its location: Columbet v. Pacheco, 48 Cal. 395; Burris v. Fitch, 76 Cal. 395, 18 Pac. 864; Darst v. Enlow, 116 Ill. 475, 6 N. E. 215; Palmer v. Dosch, 148 Ind. 10, 47 N. E. 176; Helton v. Fastnow, 33 Ind. App. 288, 71 N. E. 230; Lawrence v. Washburn, 119 Iowa, 109, 93 N. W. 73; Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851; Holloran v. Holloran, 149 Mass. 298, 21 N. E. 374; Stewart v. Carleton, 31 Mich. 270 Board of Managers of Soldiers' Home v. Jackman, 128 Mich. 679, 87 N. W. 1040; F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162, 102 Am. St. Rep. 412, 93 N. W. 251; Hedges v. Pollard, 149 Mo. 216, 50 S. W. 889; Nance County v. Russell (Neb.), 97 N. W. 320; Trussel v. Lewis, 13 Neb. 415, 42 Am. Rep. 767, 14 N. W. 155.

The rule is the same where the parties, instead of adopting a fence or hedge as the division line between their respective holdings, have adopted a public highway as their boundary: Buch v. Flanders, 119 Iowa, 164, 93 N. W. 101; Klinkefus v. Vanmeter, 122 Iowa, 412, 98 N. W. 286.

The long practical acquiescence of the parties concerned in a supposed boundary line is spoken of by some courts as constituting such an agreement upon it as to be conclusive, even if it has been erroneously located: Husted v. Willoughby, 117 Mich. 56, 75 N. W. 279; F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162, 102 Am. St. Rep. 412, 93 N. W. 251. Other courts say that an agreement may be inferred or presumed from such acquiescence: Deidrich v. Simmons, 74 Ark. 400, 87 S. W. 649; Sheetz v. Sweeney, 136 Ill. 336, 26 N. E. 648; Graham v. Gorman (Iowa), 93 N. W. 595; Turner v. Baker, 64 Mo. 218, 27 Am. Rep. 226. Other courts declare that such acquiescence is evidence of an agreement: Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230; Eaton v. Rice, 8 N. H. 378, 381; Kip v. Norton, 12 Wend. 127, 27 Am. Dec. 120; Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880. It would seem more logical to say that acquiescence on the part of the persons interested in a boundary line is evidence, or perhaps raises a presumption, that such boundary is the true one: Brummel v. Harris, 148 Mo. 430, 50 S. W. 93; Voght v. Geyer (Tex. Civ. App.), 48 S. W. 1100; Wollmann v. Ruehle, 100 Wis. 31, 75 N. W. 425; Welton v. Poynter, 96 Wis. 346, 71 N. W. 597. And where the acquiescence is for a long period of time, it becomes conclusive evidence of the correctness of the boundary: Biggins v. Champlin, 59 Cal. 113; Went-

worth v. Braun, 78 App. Div. 634, 79 N. Y. Supp. 489, affirmed in 175 N. Y. 515, 67 N. E. 1091. In the last case the court said: "In Reed v. Farr, 35 N. Y. 113, it was held that the practical location of a boundary line, and an acquiescence of the parties therein for a period of more than twenty years, is conclusive of the location of the boundary line, and that such location and acquiescence are deemed conclusive, on the ground that they constitute evidence of the correct location, of so high a nature as to admit of no contradiction. That was a case in which the line of separation between two lots was made by the erection of a fence, and there was proof that the owners and occupants of the land had respectively occupied it up to the fence, as far as the recognized boundary line, for twenty years. In Baldwin v. Brown, 16 N. Y. 359, it was held that practical location and long acquiescence in a boundary line are conclusive, because they are proof that the location is correct, and that proof is controlling in its nature as to preclude evidence to the contrary. It is not proof of a parol agreement to establish a boundary line, but gives ground for a direct legal inference as to the true boundary line."

In commenting on the above New York decisions, Justice Ladd, in Miller v. Mills County, 111 Iowa, 654, 82 N. W. 1038, observed: "It should not be overlooked that there was no government survey in that state, and the reasons which obtain in support of these decisions have not the same weight when applied to conditions in this state. However, it may be safely asserted that all the auhorities agree that acquiescence in a marked line, as forming the boundary, furnishes some evidence that it is the true line, its weight depending somewhat on the period of such acquiescence."

e. **Length of Time of Acquiescence.**—Just how long a period of acquiescence in an established boundary is necessary to conclude the parties is a question not attended with difficulties. No exact time has been fixed by the courts, and in fact each case must depend to a greater or less extent upon its own particular circumstance: Medlin v. Wilkins, 60 Tex. 409. It has already been pointed out in a previous subdivision of this note that where a boundary is established by an express agreement, the acquiescence therein by the parties need not be for the period prescribed by the statute of limitation. In truth, it would seem clear that the acquiescence in such a case need be only for a time sufficient to indicate that the parties understand the agreement and actually put it into execution. And where there is no express or formal agreement, but the parties come to an understanding and in fact agree upon and establish a boundary, and thereafter hold and occupy their respective premises in accordance therewith, it would seem that the period of acquiescence or recognition need not be sufficiently long to confer title by adverse possession: Joyce v. Williams, 26 Mich. 332; Crummel v. Harris, 148 Mo. 430, 50 S. W. 93; Haring v. Van Houton, 22 N. J. L. 61. "In many states," to quote from Cavanaugh v. Jackson, 91 Cal. 580, 27 Pac. 931, "it is held that, in the absence of any express agreement, where the boundary

line has been recognized, and parties have used and occupied according to it for a considerable period, although less than the period which would be a bar under the statute of limitations, they and all claiming under them will be estopped from afterward claiming a different boundary"; citing Smith v. Hamilton, 20 Mich. 433, 4 Am. Rep. 398; Blair v. Smith, 16 Mo. 273.

In the absence of an agreement, however, the acquiescence in and recognition of a line as the true boundary must, according to the prevailing trend of the authorities, be for the period prescribed by the statute of limitations, in order to conclude the parties from questioning the correctness of such boundary: Beardsley v. Crane, 52 Minn. 537, 54 N. W. 740; Brummel v. Harris, 148 Mo. 430, 50 S. W. 93; Buchanan v. Ashdown, 71 Hun, 327, 24 N. Y. Supp. 1122; Peters v. Reichenbach, 114 Wis. 209, 90 N. W. 184. "The general rule has been stated," said Justice Dodge in the last case cited, "that a location by the parties of the line between their holdings, with the intention of making it the true line, and followed by long acquiescence, will be binding. There is no case in Wisconsin in which those facts alone have been held sufficient unless the occupation has extended over the statutory period of twenty years."

The discussion of this question in Sneed v. Osborn, 25 Cal. 619, called forth the following expression of opinion from Justice Rhodes: "The acts of the parties may not amount to an agreement between them to locate the tract as surveyed, and it is unnecessary to consider them in that view; but do they not show an acquiescence by the parties in those lines between the tracts of land? If they do show such acquiescence, it will make no difference in the result that they acted in ignorance or under a mistake as to the true northern line of the northwest quarter of the Harrison tract. The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of the deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned must at least equal the length of time prescribed by the statute of limitations to bar a right of entry": Cited with approval in Miller v. Mills County, 111 Iowa, 654, 82 N. W. 1038; Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880.

f. Dispute and Uncertainty as to Line.—It has been affirmed that the doctrine of practical location by the parties applies not only to cases of disputed boundaries, but to those about which there can be no real question: Sherman v. Kane, 86 N. Y. 57; Ford v. Schlosser, 13 Misc. Rep. 205, 34 N. Y. Supp. 12. The cases of Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136, lend support to this view. It is erroneous to suppose, it is said in a later New York case, that practical location may be proved only in cases where there is ambiguity in the description of a deed: Bell v. Hayes, 60 App. Div. 382, 69 N. Y. Supp. 898. From some of the

decisions, however, it may be inferred that there cannot be a practical location of boundaries by the parties, in the absence of a dispute and uncertainty as to the true boundary: Hartung v. Witte, 59 Wis. 285, 18 N. W. 175; Peters v. Richenbach, 114 Wis. 209, 90 N. W. 184. A parol agreement to establish a new boundary line, when there is no dispute or uncertainty about the present one, amounts to an agreement to convey realty, and is therefore unenforceable under the statute of frauds: Vosburg v. Teator, 32 N. Y. 561; Sweet v. Warner, 14 N. Y. St. Rep. 312; Lennox v. Hendricks, 11 Or. 33, 4 Pac. 515.

g. **Mistake and Intention of Parties.**—It has been seen in preceding portions of this note that the fact that parties to a practical location are mistaken as to the true boundary does not prevent the practical location from becoming binding upon them. In truth, it may be conceded that in making a practical location the parties frequently labor under a misapprehension of the real state of facts. Notwithstanding this, however, they may be concluded by their own practical location. Nevertheless, the owners of adjacent tracts of land are not bound by their consent to a boundary which they suppose is the true line or which has been defined under a mistaken apprehension as the true line, if each claims only to the true line, subject perhaps to future ascertainment, wherever it may be when discovered. In such cases neither party is precluded from claiming his rights under the true boundary when it is ascertained: Quinn v. Windmiller, 67 Cal. 461, 8 Pac. 14; Lawrence v. Washburn, 119 Iowa, 109, 93 N. W. 73; Jacobs v. Moseley, 91 Mo. 457, 4 S. W. 135; Battner v. Baker, 108 Mo. 311, 32 Am. St. Rep. 386, 18 S. W. 911; Lemmons v. McKinney, 162 Mo. 525, 63 S. W. 92; Hatfield v. Workman, 35 W. Va. 578, 14 S. E. 153; Hass v. Plantz, 56 Wis. 105, 43 Am. Rep. 699, 14 N. W. 65; Schraeder Min. etc. Co. v. Packer, 129 U. S. 688, 9 Sup. Ct. Rep. 385, 32 L. ed. 760.

The language of Justice Ladd in Miller v. Mills County, 111 Iowa, 654, 82 N. W. 1038, is instructive in this connection: "Only when the boundary up to which each has been in possession is found to be erroneous, and the true line ascertained, is the character of the possession of the intervening strip the subject of inquiry. It has long been the settled doctrine of this state that when this has been proven, and such possession is by mistake, and without intention to assert title thereto beyond the true boundary, if it should turn out to be of the adjoining owner's land, the possession is not adverse; for, in the absence of title or color thereof, the essential element of adverse possession—claim of right—is lacking. If, however, such possession, though taken by mistake, is with the intention to claim title to the division line, and thus, if necessary, acquire title by prescription, it may ripen into title. In other words, the possession of the strip of land beyond the true boundary, taken by mistake, may or may not be adverse. It is not the mistake, but the presence or absence of an intention to claim title, that fixes the character of the entry, and

determines the disseisin: Preble v. Maine Cent. R. R. Co., 85 Me. 260, 35 Am. St. Rep. 366, 27 Atl. 149, 21 L. R. A. 829; Wilson v. Hunter, 59 Ark. 626, 43 Am. St. Rep. 63, 28 S. W. 419; Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139, 14 South. 805. The necessity of such intent is questioned by many authorities, holding that the reasons which influence the entry are not material, provided it was under claim of ownership, and continued in the belief in its rightfulness. The cases are about equally divided, and will be found collected in a note to Finch v. Ullmann, 24 Am. St. Rep. 383."

RALEIGH v. WELLS.

[29 Utah, 217, 81 Pac. 908.]

HUSBAND AND WIFE—Inheritance.—A Plural Wife does not acquire the status of a lawful wife, and is without the pale of the law of inheritance as to any property acquired by the husband before or after the marriage. (p. 692.)

HUSBAND AND WIFE—Dower.—A Plural Wife acquires no right of dower in her husband's estate. (p. 692.)

HUSBAND AND WIFE—Gift.—A Plural Wife may accept a gift from her husband. (p. 692.)

HUSBAND AND WIFE—Adverse Possession.—A Plural Wife may acquire title to real estate of her husband by adverse possession founded on a gift. (p. 692.)

ADVERSE POSSESSION Founded on Gift—Evidence.—Where adverse possession is founded on a parol gift, the gift must be established by clear and convincing evidence, and the possession must be shown to have been hostile and not merely that of a licensee. (p. 693.)

ADVERSE POSSESSION Founded on Gift—Evidence.—When adverse possession is founded on a gift, the burden of proof, as to improvements made and other acts of ownership upon the faith of the gift, is on him who asserts title by virtue of the donation and possession. (p. 694.)

GIFT—Evidence.—To Establish a Parol Gift of Land, the clearest and most satisfactory evidence is required. (p. 694.)

HUSBAND AND WIFE—Adverse Possession.—A Plural Wife who resides on the property of her husband the same as his other wives does not acquire a title by adverse possession, when her possession is not inconsistent with a mere license or permission from him. (p. 695.)

Rogers & Street, for the appellant.

H. D. Folsom, Jr., King, Burton & King and H. S. Tanner, for the respondents.

218 BARTCH, C. J. It appears from the record herein that Emily P. Raleigh brought action to quiet title in herself

to certain real estate situate in Salt Lake City, and that afterward the Mutual Investment Company, defendant therein, who had purchased the property in reliance upon the will of Alonzo H. Raleigh, the deceased, brought an action against the plaintiff therein to have the title quieted in that company. At the trial both cases were consolidated and tried together; the controversy in the one action being practically the same as in the other, and the parties to the second being also parties to the first suit. In this court the two cases were argued and submitted together, and therefore this opinion must be regarded as deciding both cases, although in terms and as to the parties it refers directly to the first case.

It appears from the evidence that in January, 1857, Emily P. Raleigh, the plaintiff, and her sister, Elizabeth, became [219] the polygamous wives of Alonzo H. Raleigh, now deceased, and they lived with him and his other wives on the premises in controversy, which had been previously acquired by himself and legal wife. Mrs. Caroline C. R. Wells, his daughter of his legal wife, and life tenant of this property under his will, also continued to reside there until 1879, and after she left two of his wives continued to live there; and the plaintiff and Mr. Raleigh resided upon the premises as husband and wife until 1886 or 1887, when he, to avoid prosecution for polygamy, moved across the street to his daughter, Mrs. Wells, and the plaintiff continued to reside upon the premises in dispute. The proof shows that at the time of her husband's death she had resided there for about forty-six years; and there was evidence introduced on the part of the plaintiff tending to show that for many years she had claimed her husband had given the property to her as her home, that she had made repairs thereon, and that it belonged to her. On the part of the defendant, the evidence tends to show that the plaintiff lived on the property merely as the plural wife of Mr. Raleigh, and that he always exercised ownership and dominion over it, paid the taxes, made and paid for the improvements, and generally did such acts and made declarations respecting the property, up to the time of his death, as were consistent with ownership. In his will, made April 15, 1890, and admitted to probate January 13, 1902, the testator dying May 13, 1901, he bequeathed the property in controversy to the Mormon Church, subject to life estates of his daughter, Mrs. Wells, and his son, Jacob T. Raleigh. The life estate of the latter, however, was, subsequent to the death

of the testator, extinguished by the church conveying for his benefit, by deed, a part of the lot to the executors under a provision of the will, and the remainder of the lot, with the appurtenances, subject to the life estate of the daughter, was finally acquired through mesne conveyances by the defendant Mutual Investment Company for a valuable consideration. His other property the testator bequeathed to his other heirs and plural wives, and the plaintiff as shown by the evidence, received an equitable share of it. On June 20, 1902, a partial [220] distribution of the estate was made, and the property bequeathed to the plaintiff set apart to her, and the same was accepted and has been retained by her. She has also received and retained the monthly allowance paid her by the executors under the provisions of the will; nor did she file any protest against the decree of distribution. She and her children, after the death of the testator, wrote a letter respecting the property to the president of the church, in which no claim of ownership, by gift, adverse possession, or otherwise, was made; but they prayed that the legatee restore to her her home. It also appears that, shortly previous to his death, the testator had agreed to execute a written lease for a part of the premises. There is much other evidence in the record tending to show that the testator, up to the time of his death, continued to exercise dominion over the same. The plaintiff has set up title in the disputed premises by adverse possession for a period of more than forty years, and seems to base such possession on a gift from the testator. At the trial the court found all the issues in favor of the defendants, and decreed accordingly. Thereupon this appeal was prosecuted, and many errors assigned.

The real contention appears to be that declarations of Mr. Raleigh, for and during more than seven years preceding his death, were such as to evidence a parol gift of the property in controversy to the appellant, antedating the period of the statute of limitations respecting real property; that for more than seven years the appellant occupied the alleged premises by adverse possession; and that, therefore, her title cannot be affected by any provision of the will, which will could not take effect until the death of the testator, nor by the manner in which the defendant, Mutual Investment Company, acquired its deed to the property. The court having found and decided to the contrary of this contention, it is insisted that its findings and decisions are erroneous; but, from a careful

examination of the proof, the conclusion seems irresistible that the case has been correctly decided, and that the contention of the appellant cannot be maintained. It is true that the appellant has lived upon these premises, and that they [221] constituted her home, for nearly half a century. Living there, it may be true, as he says, that she acted the part of a dutiful wife to a husband, that she has become greatly attached to the home where she reared her children, and that now in her old age she ought not to be compelled to leave that home. However this may be, whatever wrong she may think has overtaken her, neither law nor equity can, under the circumstances, grant her any relief. The misfortune, if in fact it be a misfortune, she must attribute to her own act—her own volition to become a plural wife. No doubt, if she had been a lawful wife, she might have renounced rights under the will of the testator, and then have appealed with much force to the conscience of the chancellor to so administer equity and justice as to save her home to her; but, when she consented to become a plural wife, she did so at her peril, in so far as the law of inheritance is concerned, and, thereby failing to acquire the status of a lawful wife, she at that time placed it beyond the power of the chancellor to grant her relief of the kind she now seeks, for thenceforth she was without the pale of the law of inheritance as to any property which her husband had acquired or might thereafter acquire As to all such property she could but depend for justice upon the will of him in whom she had thus confided. Respecting his property, which he then had or might in the future acquire, she was, under the law which she invokes after such marriage, as before, but a stranger, notwithstanding she had assumed and discharged the duties and responsibilities which usually result from marriage relations. If, therefore, he had seen fit to bequeath all of his property to another, she would have had no lawful right to complain; nor could, even in such case, any court grant her relief by enforcing a dower right, for as a plural wife she acquired no such right. She could, doubtless, have accepted a gift, and it would have been valid under the same circumstances as when made to a stranger. So such a wife could acquire title to real estate of her husband by adverse possession, founded on a gift under the same circumstances as could a stranger. The theory upon which this case was tried by the learned counsel for the appellant [222] shows that they must have recognized these principles, for

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is required. The proof must be clear, definite, and conclusive not only as to the fact of the gift, but also of acts done by the donee upon the faith of the gift, such as would render inequitable any attempt on the part of the donor to avoid it": 14 Am. & Eng. Ency. of Law, 1042.

In Waterman on Specific Performance of Contracts, section 271, it is said: "If there be an alleged parol gift of land, the mere possession of the donee does not constitute part performance, there being no valuable consideration, and possession in such a case not being inconsistent with permission simply to occupy the land."

In Ogsbury v. Ogsbury, 115 N. Y. 290, 22 N. E. 219, it was observed: "The defense was title in the defendant to the locus in quo, and this was rested upon three grounds—a parol gift by the testator, a devise of the lot by his will, and an adverse possession. The general term deemed the proof of a parol gift by the testator unsatisfactory. Such proof should be very definite and certain to serve as a basis for that equitable relief or protection which dispenses with a writing and disregards the statute of frauds, and in this case it is quite doubtful and uncertain. But even assuming its sufficiency, a further difficulty remains. There was no proof of any fact sufficient to relieve the gift in equity from a necessity [224] of a writing. It is said that the defendant went into possession and made improvements. I doubt if a mere entry into possession, unless, possibly, under some very unusual and exceptional circumstances, will warrant a decree of specific performance. But, if it ever does, that possession must be very clear and definite, such as would characterize the action of an owner, and be inconsistent with the hypothesis of a mere license; for in this class of cases equity dispenses with a writing only when definite and unequivocal facts exist which point with certainty to a prior parol agreement of gift or sale and serve to indicate its existence, and so may be taken as a substitute for the usual written evidence": 14 Am. & Eng. Ency. of Law, 1041-1045, 1049; 1 Am. & Eng. Ency. of Law, 789, 820, 834; Waterman on Specific Performance of Contracts, secs. 187, 291; Allison v. Burns, 107 Pa. St. 50; Shirley v. Shirley, 92 Cal. 44, 27 Pac. 1097; Wilson v. Wilson, 99 Iowa, 688, 68 N. W. 910; Ballard v. Ward, 89 Pa. St. 358; Murphy v. Stell, 43 Tex. 123; Hardesty v. Richardson, 44 Md. 617, 22 Am. Rep. 57.

In this case the appellant resided on the property the same as the other wives of the testator, and there appears to be nothing in her possession inconsistent with a mere license or permission from her husband to reside on the premises. There were no such overt acts or declarations of ownership on her part as to impart notice to him that her possession was hostile. Nor does the evidence show a parol gift that can be enforced. The most that can be said of the evidence respecting the gift and possession is that it is conflicting with the great preponderance thereof on the side of the respondents, and therefore the findings and decision of the trial court cannot be disturbed. It thus becomes unnecessary to discuss any other question presented.

The judgment is affirmed, with costs.

McCarty and Straup, JJ., concur.

The Property Rights of a Wife, in case her marriage is invalid, are discussed in the monographic note to Deeds v. Strode, 96 Am. St. Rep. 267-277.

MERRILL v. OREGON SHORT LINE RAILROAD COMPANY.

[29 Utah, 264, 81 Pac. 85.]

MASTER AND SERVANT—Promulgation and Enforcement of Rules.—A master owes a positive and nondelegable duty to his servants to promulgate and also to enforce reasonable rules and regulations for their safety, when the nature of the work or business requires it. He does not discharge his whole duty in this respect by promulgating rules and using ordinary care in selecting men to enforce them. (p. 700.)

MASTER AND SERVANT—Negligence of Master and Fellow-servant.—Where the negligence of a master and that of a fellow-servant together produce injury to an employé, the master is liable therefor. (pp. 700, 701.)

MASTER AND SERVANT—Fellow-servants.—The Test as to when negligence is that of a master or of a fellow-servant is whether the negligent act is a breach of positive duty owing by the master to his servant. If it is, the negligence is the master's. His liability in such a case does not depend upon the grade of service of the coemployé, but upon the character of the act itself. (p. 701.)

APPEAL.—The Appellate Court must Look at the Evidence most favorable to the respondent in considering whether the trial court should have directed a verdict for the appellants. (p. 702.)

MASTER AND SERVANT—Promulgation and Enforcement of Rules.—A master cannot delegate his duty to promulgate and enforce rules for the safety of his servants, so as to relieve himself

from responsibility. Any negligence in the failure to perform or in the manner of performing this duty is his negligence, for which he is liable. (p. 702.)

MASTER AND SERVANT—Disregard of Rules—Notice.—If a master delegates to a servant the duty of enforcing rules for the safety of his employés, notice to such servant, whatever his rank may be, that the rules are disregarded, is notice to the master. (p. 703.)

MASTER AND SERVANT—Disregard of Rules.—Knowledge by a master of the failure of his servants to observe rules promulgated for their safety may be inferred from a common practice indulged in for a year to disregard them. (p. 703.)

MASTER AND SERVANT—Failure of Servant to Observe Rules.—Where a master has promulgated rules for the display of flags by servants going between cars to make repairs, but there is evidence that such rules have not been observed for a year or more, it is a question for the jury whether it is negligence for a car repairer to fail to observe them. (pp. 703, 704.)

MASTER AND SERVANT—Assumption of Risk.—A servant has a right to assume that his master has used ordinary care to provide for the safety of employés, and he does not assume the risks occasioned by the failure of the master to discharge his duties in this respect, unless he has actual or presumptive knowledge of the master's dereliction of duty and of the perils arising therefrom, and accepts or continues in the employment without protest or complaint. (p. 704.)

MASTER AND SERVANT—Assumption of Risk.—A servant is entitled to assume that his master has exercised ordinary care in providing for the safety of employés, and is not obliged to pass judgment on the manner and method in which the master is conducting his business. (pp. 706, 707.)

MASTER AND SERVANT—Assumption of Risk by Car Repairer.—Whether a car repairer assumes the risk of his employment in going between cars without the display of flags, when the rule promulgated by the master requiring such display has been for a long period disregarded, is a question for the jury. (p. 707.)

P. L. Williams and George H. Smith, for the appellant.

Rogers & Street and L. W. Lockhart, for the respondents.

272 STRAUP, J. 1. Respondents had judgment against appellants for negligently causing the death of William A. Merrill, the husband and father of respondents. Among other things, it was alleged in the complaint that the deceased was in the employ of the appellant as a car repairer at its yard in Pocatello, Idaho, and was directed to make repairs on one of its cars in a string or train of cars standing upon one of its tracks in said yard; that the appellant had negligently failed to promulgate and enforce rules and regulations concerning the displaying of flags when car repairers were between or under cars making repairs, and at such time forbidding coupling onto or moving the said cars; that whilst the deceased was between two of said cars the appellant, without notice or warn-

ing to the deceased, negligently backed and kicked a string of cars against the cars on which the deceased was making repairs, thereby moving them and so injuring him that he died. The answer contained a general denial as to all of the alleged acts of negligence, and alleged negligence of a fellow-servant, contributory negligence of the deceased, and that his death was caused from a usual and ordinary risk of his employment.

2. The evidence on behalf of respondents, so far as material to the assigned errors, tends to show: That there were ten tracks running parallel with each other in the yard, which was about three-quarters of a mile long. The yard was used for holding, breaking, and the making up of trains, and a great deal of switching was done there. All trains, both passenger and freight, were stopped and looked over, and, if any light repairs were necessary, they were made there. The deceased was a member of a crew of car repairers, over which there was a foreman. There was a switch crew switching in [273] the yard, over which there was also a foreman. There was also a yardmaster and a general foreman of the carshops. The deceased was between two cars of a string of four or five cars standing on track No. 6, repairing a coupler. He was working alone. There was no system of signaling or warning used by appellant to make known that car repairers were under or between cars while making repairs, standing upon the track in the yard. There were no flags or other signals displayed on the cars where the deceased was at work. Appellant had not furnished flags for such purpose. Light repairs would be made while the switchman were rearranging the cars, and between the time the cars would be switched and moved about. The men were not in the habit of using flags to protect themselves when making repairs. When there were two men working together, one would look out while the other made the repairs. When a repairer was alone, he looked out for himself and took his own chances. About a year prior to the accident, appellant and the men were in the habit of using flags, and when a train came into the yard the inspectors and repairers were in the habit of putting a flag at each end, and then the inspection would be made. About a year prior to the accident, complaint was made by the yardmaster to the foreman of the inspection and repair crew that such method held the cars too long, and prevented needed switching and making up of trains in the yard, and the yardmaster stated to the

foreman that the flags would have to be taken off as quick as the inspection was done, and that the work would have to be done afterward. After that the repairers would work between the cars without a flag. The deceased was in the employ of appellant, engaged at this work in its yard, a little over a month. Whilst he was at work between two of said cars a string of about twenty-four cars in the process of switching were kicked and run down upon the track, and against the cars where the deceased was at work, thereby injuring him so that he died. The cars would not have been kicked down and run against the other cars, had a flag or some other danger signal been displayed about or upon them. The above, of course, is a statement of that portion of the evidence [274] most favorable to the respondents. Appellant introduced evidence showing that it had not only established and promulgated rules and regulations concerning the displaying of flags under said circumstances, but that it had also enforced such rules; that at the time of the accident, and for a long time prior thereto, it had promulgated and enforced a rule (No. 26): "A blue flag by day and blue light by night displayed at one or both ends of an engine, car or train indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals without first notifying the workmen."

Another rule: "When inspecting and repairing cars which they do not wish moved, they must protect themselves by placing conspicuously a blue signal on both ends of the car, as provided in rule 26, and when necessary to make repairs on a car in a train, they must place blue signals on both ends of the train before commencing work. If an engine is attached to it, they will place a blue signal upon the engine where it can be plainly seen by the enginemen and fireman."

It introduced evidence showing it had furnished and had on hand an ample supply of flags for such purpose, and that there was no disregard of the use of them, but that they were generally used and displayed by the repair men when inspecting and making repairs, in accordance with, and as it was their duty to do under the said rules.

3. The court charged the jury that respondent's rights to recover in the action were to be determined by the law of the

state of Idaho, and charged, under such law, that the foreman of the repair or inspecting crew, the foreman of the switching [275] crew, and all other persons at work in and about the yard were fellow-servants with the deceased, and that appellant was not liable for any negligence of either said foremen or said persons. But the court further charged that if the appellant was negligent, as alleged in the complaint in respect to promulgating and enforcing rules and regulations, and the deceased did not know of such negligence, and if the negligence of appellant combined and concurred with the negligence of a fellow-servant, and if such negligence of the appellant was a proximate cause of the injury and death of deceased, it would be liable. The court fully charged the jury as to their determination when and under what circumstances rules were required, and as to the duties of appellant in promulgating and enforcing them, and, if ordinary care in these respects had been used, its duty was discharged, "even though it has failed in its efforts to secure obedience or observation of the rules. If, after performing this duty, the rules are violated or not enforced by the fellow-servant," and injury is occasioned as a result thereof, appellant was not liable. The court also fully charged as to contributory negligence, and, among other things, that it was the duty of the deceased to use "ordinary care to acquaint himself with the rules and regulations of his employer, to familiarize himself with the methods employed by the employer in the performance and conduct of his business, and to guard and protect himself against injury that might arise from the way the business was being conducted and managed. The servant must exercise the same degree of care for his own safety and protection as the master is required to observe toward his employés, in providing for their safety and guarding against their injury," and, if the deceased did not do these things, respondents could not recover. The court also charged that the deceased assumed the usual and ordinary risks incident to his employment, the usual and ordinary risks arising from the manner in which the business in which the deceased took part was managed and conducted, the risks or hazards known to him, or which were open and obvious, or which, in the exercise of ordinary care, would have been known to him, and [276] that appellant was not liable for an injury resulting from any such risks.

4. The principal assigned error, and the only one discussed in the brief, relates to the refusal of the court to give appellant's request to direct a verdict for it. This is claimed upon the grounds that there was no negligence shown upon the part of appellant, for that it had promulgated rules and regulations calculated to secure the safety of its employés, had flags on hand, and, if the rules and regulations were not carried out, such failure, if it amounted to negligence, was that of a fellow-servant. That is to say, the master has performed his full duty, by framing and promulgating rules, and "exercising care to enforce the rules by the selection of reasonably competent persons to perform the work," and that appellant is not liable for a failure to carry out the methods as prescribed. It is also claimed that the deceased was guilty of negligence in not displaying a flag, and that the danger was a usual and ordinary risk incident to the employment, and was therefore assumed by him. Appellant, with great care and at some length, discussed the question, and cited numerous authorities to the effect that under the law and the decisions of the state of Idaho the foreman of the car repairers, and switch crew, and all persons in the yard, regardless as to whether they were foreman or yardmaster, were fellow-servants with the deceased. To this contention it is quite sufficient to say that the trial court so held with appellant, and so charged the jury. The important question, therefore, is whether the negligence, if any there was, causing the injury and death of the deceased, arose and grew out of a failure to perform some primary or positive duty which appellant, as master, owed the deceased, or whether it arose out of some mere negligent act of a person or persons about the yard, held to be fellow-servants, including the said foreman and yardmaster, or whether there was any negligence upon the part of the appellant with respect to its primary or positive duties, combining and concurring with the negligence of a fellow-servant as a proximate cause of the injury and death.

It must be conceded it is settled law that among the primary
277 and positive duties of the master, owing his servant, is the one of using ordinary care to promulgate and enforce reasonable rules and regulations for the safety of his servants, when the nature of the business or the work requires it, and that this duty is nondelegable. And it also is well-settled law that, where the negligence of the master and that of a fellow-servant together produce injury, the master is liable

therefor on the ground of concurring negligence; that the mere fact of a concurrence of one who stands in the relation of a fellow-servant to the one receiving the injury does not exonerate the master from his original fault. The primary duty here resting upon appellant was not only to use ordinary care to promulgate rules, but also to use ordinary care to enforce them. The doctrine which appellant here invokes—that the master's duty was performed when he promulgated rules, and used ordinary care in selecting men to enforce them—cannot obtain. For the care with respect to enforcing the rules is just as much a primary and nondelegable duty as is the one of promulgating rules or of furnishing a safe place or appliance.

"An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business and the guidance and control of his servants. He is also under the obligation of enforcing the rules in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants. In other words, a master's duty does not end with prescribing rules calculated to secure the safety of his employés. It is equally binding on him honestly and faithfully to require their observance": Labatt on Master and Servant, sec. 214.

Independent of some statute defining "fellow-servant" (there is none in Idaho), the test established by the supreme court of the United States and those courts not following the superior servant doctrine, of which Idaho is one, as to when negligence is that of the master or of a fellow-servant, is [278] whether the negligent act is a breach of positive duty owing by the master to his servant. If it is, then negligence in the act is the negligence of the master. In such case the liability of the master is not made to depend in any manner upon the grade of service of a coemployé, but upon the character of the act itself. If, instead of personally performing his obligations with respect to his primary and positive duties, the master engages another to do them for him, he is liable for the neglect of that other, which in some case is not the neglect of a fellow-servant, no matter what his poistion as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such: Cen. R. Co. v. Keegan, 160 U. S. 264, 16 Sup. Ct. Rep. 269, 40 L. ed. 418; North Pacific R. Co. v. Peterson, 162 U. S. 353, 16 Sup. Ct. Rep. 843, 40 L. ed. 994; B. & O. R. R. v. Baugh,

149 U. S. 368, 13 Sup. Ct. Rep. 914, 37 L. ed. 772; New England R. Co. v. Conroy, 175 U. S. 344, 20 Sup. Ct. Rep. 85, 44 L. ed. 181; Hough v. Texas etc. Ry. Co., 100 U. S. 213, 25 L. ed. 612; N. P. R. R. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29 L. ed. 755; Pool v. Southern P. R. R., 20 Utah, 210, 58 Pac. 326. We think this doctrine, in substance and effect, is recognized by the supreme court of Idaho, the state where the acts complained of occurred: Harvey v. Alturas G. Min. Co., 3 Idaho, 510, 31 Pac. 819.

It is quite true, when the evidence of appellant is considered, it shows that appellant established and promulgated sufficient and proper rules and regulations, used ordinary care to, and did, enforce them, furnished and kept on hand sufficient and necessary flags for such purpose, and that by yielding obedience to such rules the safety of the deceased was reasonably and properly protected and guarded, and that his injury and death were the result either from his failure and neglect to display flags whilst between the cars, or from some omission or commission of the men about the yard in not properly obeying or observing the rules. But in considering whether the court should have directed a verdict for appellant, we must look to that evidence in the record which is most favorable to the respondents; and, when the truth of such testimony is assumed, quite a different state of facts is [279] made to appear. We think the evidence on behalf of respondents was quite sufficient to submit to the jury the question as to whether appellant used ordinary care, not so much, probably, in establishing and promulgating rules and regulations, but particularly in using ordinary care to enforce them, and in furnishing and providing flags. There was some evidence which tended to show that flags had not been furnished and provided by the appellant, and that there was no system of signaling or warning used by appellant to make known when car repairers were under or between cars, making repairs, and that repairs were made between the times when the cars would be switched and moved about, and that it was the practice and custom not to use flags, and such practice continued for a year prior to the accident, and, though rules and regulations had been established and promulgated, they were abandoned, or so generally and habitually disregarded, from which it could be presumed compliance therewith was not exacted, but waived. The truth and the weight of this testimony were for the jury, which, if believed by them, was suffi-

cient to find that ordinary care had not been used by the appellant in either establishing or in enforcing rules and regulations for the safety of its servants. And as this duty was a primary one, and one which could in no way be delegated so as to relieve appellant from responsibility, therefore any negligence in the failure to perform or in the manner of performing it was appellant's negligence, for which it is liable.

The contention made that it was not shown appellant, through any officer or agent standing in the place of the master, had notice or knowledge that the rule was disregarded, and that notice to or knowledge of the foreman or yard master was not its knowledge, cannot prevail, and is fully answered by the following cases and those already cited: North P. R. Co. v. Babcock, 154 U. S. 200, 14 Sup. Ct. Rep. 978, 38 L. ed. 958; Hough v. Texas etc. Ry. Co., 100 U. S. 213, 23 L. ed. 612.

The knowledge of appellant is not charged by virtue of these men being foremen, but from the fact, as shown by the evidence, to them or some of them was delegated the duty to discharge a primary duty of appellant—of enforcing the 280 rules. And when a master, instead of performing his primary or positive duty himself, delegates it to another, then, no matter what the rank of such other is, whether high or low, notice to him and his knowledge with respect to such matters is notice to and knowledge of the master. Besides, if true, as testified to by a witness, that for a year it was common practice to disregard the rule, knowledge on the part of the appellant may be inferred therefrom.

It is further urged that the deceased was guilty of negligence, because of his failure to display a flag before going between the cars to make the repairs. It is true, if appellant had established the said rule with respect to displaying a flag, and that the deceased knew there was such a rule, and that such rule was not generally or habitually disregarded, and not abandoned, but reasonably enforced, and that appellant furnished flags for such purpose, and that the deceased failed to display the flag as required by the rule, and that such failure contributed to his injury, clearly respondents were not entitled to recover. But there is evidence in the record to show that appellant had not furnished or provided flags for such purpose during the time that deceased was employed at and about the yard, and for a year prior thereto, and that car

repairers during said time were not in the habit of using flags when making repairs in the yard. And appellant cannot well say—much less can we, as matter of law, say—the deceased was guilty of negligence in not using and displaying a flag, when it was not provided or furnished him. And because there was evidence in the record showing, though rules and regulations had been established and promulgated, yet for a year prior to the accident they were generally disregarded, under circumstances from which it could be presumed appellant knowingly permitted such disregard, or approved it, without attempting to enforce the rules, we think it was a question for the jury to determine whether the deceased was or was not guilty of negligence in not displaying a flag or not observing the rules: Pool v. Southern P. R. Co., 20 Utah, 210, 58 Pac. 326; Boyle v. Union P. R. R., 25 Utah, 420, 71 Pac. 988; Wright v. Southern P. R. R., 14 Utah, 383, 46 Pac. 374.

[281] It is further claimed that deceased assumed the risk. It is true, the servant assumes the usual and ordinary risks incident to his employment. But with the exception hereinafter stated, he does not assume the danger and perils occasioned through the negligence of his employer.

"It is true that, when the plaintiff entered the employment of the defendant as switchman in the yards at Carlin, he assumed the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he did not assume the perils occasioned through the negligence of his employer": Wright v. Southern P. R. R., 14 Utah, 392, 46 Pac. 374; Pool v. Southern P. R. R., 20 Utah, 216, 58 Pac. 326.

In entering his employment the servant has the right to assume that the master has used ordinary care with respect to the performance of his primary and positive duties, and the servant does not assume the perils and risks occasioned by the negligence of the master in his failure to perform these duties, unless the servant has actual or presumptive knowledge that these duties have not been performed, and the perils and risks arising therefrom, and to which he is exposed, are known to him, or are so obvious that knowledge may be presumed, and, with such knowledge, he accepted or continued in his employment without complaint or protest.

"The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of

the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use [282] the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover": Choctaw etc. R. Co. v. McDade, 191 U. S. 68, 24 Sup. Ct. Rep. 24, 48 L. ed. 96.

After stating the general rule again, it was said: "But no reason can be found for, and no authority exists supporting, the contention that an employé, either from his knowledge of the employer's methods of business, or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employé assumes the risks usually incident to the employment. The employé, on the other hand, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employé is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. In assuming the risks of the particular service in which he engages, the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will [283] fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and, whilst this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it ob-

viously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances": Texas etc. Ry. v. Archibald, 170 U. S. 671, 18 Sup. Ct. Rep. 777, 42 L. ed. 1188.

Tested by these principles, we cannot say, as matter of law, that the deceased assumed the risk of the peril and danger to which he was exposed and which caused his injury, but we think it was a question of fact to be submitted to the jury; and the law with respect thereto, we think, was stated more favorably to the appellant than it had a right to ask. Here was evidence to show that the peril to which the deceased was exposed was occasioned through the want of ordinary care by appellant, either in not promulgating a proper rule, or by not using ordinary care in enforcing it, which, of course, was its negligence.

The point now is, did the deceased have knowledge, either actual or presumptive, that the nature of the business was such as to require rules and regulations; whether rules had been promulgated; if promulgated, what was his knowledge with respect to the disregard or waiver or abandonment of the rules; what was his knowledge with respect to the perils occasioned thereby; his knowledge as to the condition of the premises, the things then being done or about to be done, the nature and character of the work then being performed about the yard, all to be considered in connection with what he was doing himself, and from all of which his peril arose; and how manifest and obvious this peril was made to appear or his perilous situation disclosed. His knowledge of these matters does not rest upon any direct evidence in the case, but it is to be gathered and deduced from the length of time he was 284 employed about the yard, the nature and character of his work, his conduct with respect thereto, his experience and familiarity therewith, the condition and situation of the premises, the nature and character of the work and the things there done; and from all the facts and circumstances bearing upon the question, and tending to show knowledge of his peril, or the lack of it. It is apparent what knowledge the deceased had, either actual or presumptive, with respect to these matters, was a question of fact. Furthermore, it is the law that a servant has the right to assume that the master has used ordinary care in the discharge of his duties, and that "the employé is not obliged to pass judgment upon the employer's

method of transacting his business," and he may rest upon the presumption that the master has done his duty, until, of course, he has knowledge, either actual or presumptive, that such duty has not been performed, and he knows the danger, and the peril to which he is exposed from the want or manner of discharging it, or that the peril therefrom is so obvious that knowledge may be presumed. If appellant here was negligent with respect to its duties, we cannot say, as matter of law, that the deceased was called upon to pass judgment upon the manner and method in which appellant was conducting its business, as is shown by the evidence on behalf of respondents, and that he had knowledge that such method was improper or inadequate, and that he knew the perils arising therefrom, and to which he was exposed, and that he, with such knowledge, accepted or continued in his employment. We think it was a question of fact for the jury. What was said upon this question in the Pool case equally well applies here. Our conclusion, therefore, is, whether the nature and character of the work and business were such as to require appellant, in the exercise of ordinary care, to promulgate and enforce rules and regulations, and as to whether its duty in these respects was perfomed with ordinary care; whether the injury and death were the result of such want of care, or of a negligent act of a fellow-servant, or of a concurrence and combination of both; whether the deceased was himself guilty of negligence, or whether he assumed the risk—were, under [285] the circumstances of the case, all questions of fact to be submitted to the jury. Upon all these matters the charge of the court was quite full, and on some of them stating the law more strongly for appellant than many of the authorities seem to indicate.

The judgment of the court below is therefore affirmed, with costs.

Bartch, C. J., and McCarty, J., concur.

One of the Positive Duties of a Master is to adopt and enforce rules for the protection and safety of his employés when the nature of the work or business is such as to require such a course: Moore Lime Co. v. Richardson, 95 Va. 326, 64 Am. St. Rep. 785; Missouri etc. Ry. Co. v. McElyea, 71 Tex. 386, 10 Am. St. Rep. 749; Szymanski v. Blumenthal, 4 Penne. 511, 103 Am. St. Rep. 132. As to the effect of a disobedience, habitual or otherwise, of rules and regulations by employés after they have been promulgated by the master, see Konold v. Rio Grande etc. Ry. Co., 21 Utah, 379, 81 Am. St. Rep. 693; Gordy v. New York etc. R. R. Co., 75 Md. 297, 32 Am. St. Rep. 391.

A Master cannot Escape Responsibility for the personal duties which he owes to an employé by delegating their performance to another employé, whatever may be the latter's rank: Rogers v. Cleveland etc. Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185; Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208; note to Mast v. Kern, 75 Am. St. Rep. 588, 595.

The Doctrine of Assumption of Risks in the law of master and servant is discussed in the monographic notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 886-900; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 314-322.

LEACH v. OREGON SHORT LINE RAILROAD COMPANY.

[29 Utah, 285, 81 Pac. 90.]

EVIDENCE—Res Gestae.—Declarations and Acts sought to be introduced in evidence as part of the res gestae must be connected with or grow out of the main transaction which is the subject matter of litigation, and must tend to explain and elucidate it. (p. 711.)

EVIDENCE—Res Gestae.—In an Action Against a Railroad Company for the death of a brakeman who was knocked from a moving train by a bridge, an exclamation made by the conductor to another brakeman a few seconds after the accident while giving orders in respect thereto: "My God! Go back and see if you can find Leach. The bridge knocked him off"—is admissible as part of the res gestae. (p. 713.)

MASTER AND SERVANT—Assumption of Risk.—The doctrine of assumed risks arises out of contractual relations existing between master and servant. The servant in his contract of employment assumes the natural and ordinary risks and dangers incident to the service. These risks, and these only, the parties are presumed to have in mind when they enter into the contract. (p. 715.)

MASTER AND SERVANT—Assumption of Risk.—When there are unusual or extraordinary dangers connected with a service, due to defects in the appliances and equipments used in the operation of the business, an employé assumes the risk thereof, if they are known to him, or are so obvious that he is presumed to have knowledge of their existence, and he continues, without objection, to use such appliances and equipments. (p. 716.)

MASTER AND SERVANT—Assumption of Risk by Brakeman. Where a brakeman is transferred from a regular freight train to a mixed train on which, in the performance of his duties, he is required to pass along the sides of cars, instead of through them or over their top, he has a right to assume, notwithstanding he has been employed on his run some eight or nine months on the freight train and has made two or three trips in the night on the mixed train, that the railroad company has constructed its bridges wide enough to enable him safely to pass along the side of a car as the train crosses over them. (p. 717.)

P. L. Williams and George H. Smith, for the appellant.

Snyder & Wright and Powers, Straup & Lipman, for the respondents.

[292] McCARTY, J. Plaintiff brought this action on her own account, and as guardian ad litem for her minor child, to recover damages against defendant company for the death of John Leach, the husband and father of the plaintiffs, alleged to have been caused by the negligence of the defendant. The complaint charges that said John Leach was a brakeman in the employ of defendant, and that it was negligent in failing to exercise care to furnish him a reasonably safe place to work. The acts of negligence relied upon for a recovery are that defendant negligently maintained the uprights of a bridge dangerously near the track, and negligently equipped its car with insufficient appliances or means to enable its employés to pass along the side of the same in the discharge of their duties. The answer of defendant, after admitting the employment, denied generally all the allegations, and affirmatively pleaded contributory negligence, and the assumption of risk on the part of said John Leach. The trial of the case resulted in a verdict for plaintiff in the sum of ten thousand dollars. From the judgment entered on the verdict, this appeal is taken.

The record in this case discloses about the following facts: John Leach was forty-six years of age, and an experienced railroad brakeman, having worked at this business for more than two years. At the time of his death, April 11, 1902, he had been working as brakeman for about eight or nine months between Juab, Utah, and Frisco, Utah. His run on [293] the south end was between Juab and Frisco, leaving Juab about 11 o'clock at night, and returning, when on time, the second morning thereafter about 6 o'clock. Sometimes the train would be late, and he would not get back until late in the afternoon. Prior to April 1st his run was on a freight train, but beginning on the latter date it had been on a mixed train; that is, a train composed of freight and passenger cars, the latter being attached to the rear of the train. On the night in question the train was returning from Frisco, and consisted of nine cars, including the coaches. Immediately behind the freight-cars was the combination or blind baggage-car. This car was divided into two parts that were separated and unconnected. The forward end is used for the United States mail, and is in charge of a United States mail agent. Trainmen are not allowed in this part of the car. The rear portion is the baggage compartment. There are two sliding

doors, one on either side of the baggage compartment, and an end door at the rear. On the left-hand side of this car as it was going forward an iron foot rail extended from the side door along the side of the car around the mail end to the forward platform, and a hand railing near the top of the car extended the same way. The foot rail was one inch in width, and stood out two inches from the side of the car, making a space of only three inches from the side of the car to the outside of the railing. These railings were the only means provided for the trainmen to walk around the side of the car in going to and from the forward part of the train or to the coaches. The men in passing around this car would hold onto the top rail with their hands and, with their feet on the lower rail, walk sidewise back and forth. The hand rail was five feet and seven inches above the foot rail. The bridge on which Leach, the deceased, was killed is known as the "Howe Truss Bridge," and had upright sides, but no top or overhead work. The extreme height of the uprights of this bridge above the rails of the track was ten feet. The distance between the sides of the combination car referred to, when passing over the bridge, and the uprights of the bridge, was two feet, two and one-half inches. On the night of the accident the conductor, when the 294 train was in the vicinity of the bridge, went to Leach and requested him to go out and see if the ties were all right, and if they had shifted, and to do this before the train reached the bridge. This referred to a carload of ties. Leach went forward into the baggage-car, opened the side door of the baggage-car, and went out on the side by means of the railings hereinbefore described, and closed the door after him. Hawkins, the conductor, soon after opened the door and looked out; saw Leach, who was within a few feet of the forward end of the car. Hawkins then swung out on the rail on the side of the car and started forward, and when he was about halfway between the baggage-car door and the mail-door he heard, so he says, Leach's lantern crash. The conductor then immediately returned inside of the baggage-car, sprung the air and gave the signal to stop, and from there he hurried on into the smoking-car. And there is evidence in the record which tends to show that when he entered the smoker he made the following statement to one Harris: "My God! Go back and see if you can find Leach. The bridge knocked him off." The record fur-

ther shows that Hawkins, from the time Leach fell or was knocked off the car, acted with promptness and celerity. Quoting his own language, as it appears in the record, he says: "Well, it was done as quick as I could do it." The train was stopped, and the train crew went back and found Leach on the bridge by the side of the track, and about two-thirds of the way from the south end. His head was crushed and some of his limbs were broken, from which injuries he then and there died.

Plaintiff read to the jury the deposition of one William J. Harris, who, at the time of the accident, was a brakeman on the same train with Leach. The following portions of the deposition were admitted, over defendant's objection: "Mr. Leach and I were sitting in the same seat in the smoking-car. [295] He [referring to Hawkins, the conductor] said: 'Leach, I want you to go out overhead and see how those ties are before we pass over the bridge.' Leach said: 'All right, sir,' and went out, passed through the baggage-car, opened the baggage-car door, and by that time we must have been to the bridge. I still sat in my seat where I was until Mr. Hawkins came to me and said: 'My God! Go back and see if you can find Leach. The bridge knocked him off.'"

Appellant contends that these statements of Hawkins, and, in particular, his declaration wherein it is claimed he said: "My God! Go back and see if you can find Leach. The bridge knocked him off"—were immaterial and incompetent, for the reason that they are hearsay, and that it was error for the court to admit them. On the other hand, respondent insists that they were a part of the res gestae, and were therefore admissible on that ground. While there is no fixed and settled rule by which the admissibility of acts done or declarations made in relation to a transaction, under the doctrine of res gestae, shall be determined, yet the great weight of authority holds that the declarations or acts sought to be introduced in evidence as part of the res gestae must be connected with or grow out of the main or principal transaction which is the subject matter of the litigation, and must tend to elucidate and explain such transaction: Gillett on Indirect and Collateral Evidence, 242-247; 2 Jones on Evidence, 347. In Louisville etc. Ry. Co. v. Buck, 116 Ind. 576, 9 Am. St. Rep. 883, 19 N. E. 458, 2 L. R. A. 520, the court tersely, and we think correctly, stated the general rule as follows: "It is

not always easy to determine when declarations having relation to an act or transaction should be received as part of the res gestae, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said: that declarations which were the natural emanations or outgrowths of the act or concurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made, so nearly contemporaneous [296] as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself." And the court further says: "Any other rule would in many instances operate to defeat the accomplishment of justice by excluding evidence of the most trustworthy character."

McKelvey, in his work on Evidence, page 278, says: "The ground of reliability upon which such declarations are received is their spontaneity. They are the ex tempore utterances of the mind under circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings; they are uttered while the mind is under the influence of the activity of the surroundings."

In 24 American and English Encyclopedia of Law, 665, it is said: "The principle upon which the admission of such evidence rests is that the declarations may be made so soon after the happening of the principal fact, and be so intimately interwoven therewith by the surrounding circumstances as to raise a reasonable presumption that they are the spontaneous utterance of thoughts created by and springing out of the transaction itself and to exclude the presumption that they are the result of premeditation or design": Note 2 and cases cited.

In 1 Wharton on Evidence the author says: "It is in any view clear that the declarations which are the immediate accompaniments of an act [297] are admissible as part of the res gestae remembering that immediateness is tested by closeness, not of time, but of causal relation, as just explained."

Applying the facts in this case to the foregoing principles, we are clearly of the opinion that the statements of Hawkins as to how the accident happened, which, the record shows, were made but a few seconds, at most, after the accident occurred and while he was giving orders in the line of his duty respecting the accident, were admissible in evidence as a part of the res gestae. There is evidence in the record which tends to show that, when Hawkins returned to the car and made the statements attributed to him, his face was covered with blood. And this testimony is not wholly denied, for Hawkins admitted on cross-examination that, at the time he heard Leach's lantern drop, "a little white speck," "a little fleshy substance," which he supposed was a portion of Leach's brain, struck him in the forehead. This circumstance, and the fact that he knew that Leach in all probability had been hurled to his death, together with the character of the expressions or statements attributed to him when he informed Harris of the accident, would indicate that he was laboring under considerable excitement, and that the declarations under consideration, if made at all by him, were the emanations or outgrowth of the occurrence, and the instinctive and natural outburst of expression explaining what had just happened to Leach, which clearly brings them within the rule as declared by the great weight of authority. In the case of Ohio etc. R. W. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733, the plaintiff was hurt in a collision of some cars. The engineer immediately after the injury came a car's-length to see the plaintiff, and the conversation there had between them was admitted in evidence, and the court held it was not error. The court, in a well-considered opinion, discusses the doctrine of res gestae, and reviews many cases in which the question was involved and discussed, and in the course of the opinion says: [298] "The case at our bar differs from those cited in essential particulars, for here the declarations were made at the time and place where the collision they referred to occurred, and they illustrated the event, and were made while all who participated in it were present. We may therefore well adjudge that there was no error in overruling the appellant's objections without denying the doctrines asserted in our cases. The latest decision of our court upon the question is that given in the case of Louisville etc. Ry. Co. v. Buck, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N.

E. 453, 2 L. R. A. 520. In that case the conductor of the train on which the intestate of the plaintiff was employed as a brakeman was on the 'caboose' when he received notice that the deceased had been injured while coupling cars, and he immediately ran forward and found the deceased under the rear end of the second car from the engine. The conductor, when he took the deceased from under the car, asked: 'How did this happen?' and the deceased fully described the cause of the accident. The court held that this testimony was competent, and cited many cases in support of its conclusions'': Hanover Ry. Co. v. Coyle, 55 Pa. St. 396; McLeod v. Ginther's Admr., 80 Ky. 399; Leahy v. Cass Ave. etc. Ry. Co., 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58.

Appellant requested the court to give to the jury the following instruction, which was refused: "You are further instructed that the servant, upon entering the employment of the master, assumes all the ordinary risks incident to his employment; and if the death of the deceased, John Leach, was occasioned by a risk which was incident to his business as a brakeman, the plaintiffs here cannot recover in this action. And you are further instructed that if you believe from the evidence that the bridge in question was not a reasonably safe place, in view of the equipment of the baggage-car and the [299] manner in which brakemen were required to discharge their duties, and that the deceased, prior to the accident, by exercising such care and prudence in informing himself of the situation of his master's premises as would have been exercised under the same circumstances by a man of ordinary prudence, could have learned, or did actually know, that the said place was not reasonably safe, then, in that event, the risk of being injured by coming in contact with the bridge in the manner claimed by plaintiffs here was a risk incident to the business in which the said John Leach was engaged, and for his death, under such circumstances, defendant would not be liable." The refusal of the court to give the foregoing instruction is now assigned as error. The court, however, in stating the issues, instructed the jury as follows: "The plaintiffs claim that the space between the upright portion of the bridge and the foot rail was insufficient to enable the said Leach to go safely along said foot rail, and that by reason of such insufficient space where said Leach was engaged in performing his work at the time of the accident was not a

reasonably safe place." The court also gave the following instruction: "If you believe from the evidence that the deceased was not thrown from the car because of coming in contact with the upright portion of the bridge, but that he lost his hold and fell, that in such case your verdict must be for the defendant." The court, by giving these instructions to the jury, limited plaintiff's right to recover to the alleged negligence of defendant in maintaining the upright portions of the bridge too close to the railroad track, and thereby rendering the space between such upright timbers and braces of the bridge and the hand and foot railings on the side of the baggage-car insufficient to enable the deceased, Leach, while in the discharge of his duties, to pass and repass along said railings when the train was passing over the bridge. The doctrine of assumed risks arises out of the contractual relations existing between master and servant. The servant in his contract of employment assumes the natural and ordinary risks and dangers that are incident to or arise out of the work which under his contract he is called upon to [300] perform. These risks and hazards, and these only, the parties are presumed to have in mind when they enter into the contract. If, however, there are other risks of unusual or extraordinary character connected with the service or work in which the servant is engaged, that are due to defects in the appliances and equipments used in the operation of the business, and are known to the servant, or are so open and obvious that he will be presumed to have knowledge of their existence, and he continues, without objection, to use such defective appliances and equipments, he assumes the extra risks and hazards arising therefrom. In the case of Texas etc. Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42 L. ed. 1188, the court says: "The employer, on the one hand, may rely on the fact that the employé assumes the risks usually incident to the employment. The employé, on the other hand, has the right to rest on the assumption that the appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise."

The supreme court of the United States, in the case of Choctaw etc. R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48 L. ed. 96, again declared this same doctrine as follows: "The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume risks of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's method of transacting his business, but may assume that reasonable care will be used in furnishing appliances [301] necessary for its operation. This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus, in the face of knowledge and without objection, without assuming the hazard incident to such situation": Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573; Garity v. Bullion etc. Co., 27 Utah, 534, 76 Pac. 556; Shearman and Redfield on Negligence, 185; Bailey on Master's Liability, 150-155; 1 Labatt on Master and Servant, 260.

Now, the record in this case shows that Leach, at the time he was killed, was making his third or fourth trip as brakeman on this "mixed" train, which passed over the bridge in question and others of a like character on this route in the night-time. And there is absolutely no evidence in the record which goes to show, and no fact or circumstance from which it can be inferred, that Leach had, at any time prior to the accident which cost him his life, passed along the outside of the baggage-car by means of the railings referred to while the train was passing over this or any other bridge of the same kind and structure. Nor is it shown that he had any knowledge of the close proximity of the railings on the baggage-car to the upright portions or sides of the bridges along the route on which he was brakeman. But, on the contrary, the record shows that he had made but a few trips on this "mixed" train, and on each occasion passed over these truss bridges in the night-time, and at a rate of speed of from twenty to twenty-five miles per hour, which gave him no opportunity whatever to know or appreciate the danger of passing along the hand and foot railings on the baggage-car while it was passing over the bridges referred to. Neither is it shown nor can it be inferred from the evidence in the case, that Leach's experience as a brakeman on freight trains before he went to work on the mixed train was such as to inform

him of the narrow space between the sides of the combination baggage-car and the upright portions of the bridges. The evidence tends to [302] show that the brakeman on trains made up exclusively of a caboose and freight-cars, in going back and forth along the train, would pass through and over the tops of the cars, and not climb around on the sides thereof, as they are compelled to do on the combination or blind baggage-cars. When the defendant transferred Leach from the trains made up exclusively of freight-cars and a caboose, and put him to work on the mixed train, he had a right to assume, and to act upon such assumption, that it had so constructed and maintained its roadway and bridges that he could perform his duties with reasonable safety; and if the bridges, or any of them, were too narrow to enable him to pass around the sides of the baggage-car with reasonable safety on the railings provided for that purpose while the train was passing over such bridges, it was the duty of defendant to advise him of that fact. In the case of Texas etc. Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42 L. ed. 1188, the court says: "In assuming the risks of the particular service in which he engages, the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances": Louisville etc. Ry. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; Baltimore etc. Ry. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; St. Louis etc. Ry. Co. v. Irwin, 37 Kan. 701, 1 Am. St. Rep. 266, 16 Pac. 146; Boss v. Northern Pac. Ry. Co., 2 N. Dak. 128, 33 Am. St. Rep. 756, 49 N. W. 655; Illinois Ter. Ry. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328; Pidcock [303] v. Union P. Ry. Co., 5 Utah, 612, 19 Pac. 191, 1 L. R. A. 131; 20 Am. & Eng. Ency. of Law, 2d ed., p. 73; Chicago etc. R. Co. v. Stevens, 189 Ill. 226, 59 N. E. 577; Choctaw etc. Ry. Co. v. McDade, 191 U. S. 64-67, 24 Sup. Ct. Rep. 24, 48 L. ed. 96.

There are two propositions contained in the instruction asked for by appellant. The first is, if the death of Leach was occasioned by a risk which was incident to his business as brakeman, the plaintiffs cannot recover. And the second is, if he knew, or by the exercise of ordinary care and prudence would have known, that the place where he was killed was not reasonably safe, the defendant would not be liable. As to the first proposition, the facts and circumstances show that the risk was not such as Leach was legally bound to know or anticipate when he went to work on the "mixed" train. And the second proposition contained in the instruction does not correctly declare the law applicable to the facts in this case. It is not claimed that Leach received any instructions respecting the close proximity of the sides of the bridge to those of the baggage-car. And, as we have hereinbefore stated, he had a right to assume that the space between the baggage-car and the uprights and the braces of the bridges was sufficient to enable him to pass and repass along the sides of the car in the performance of his duties with reasonable safety. Under the law as declared by the foregoing decisions and as announced by the text-writers, the burden of inspection was not on him to ascertain if there were any defects in the roadway, or in the structure of the bridges, which would tend to make of the service in which he was engaged one of extraordinary danger, as the foregoing instructions asked for by appellant would imply. The court instructed the jury very elaborately upon the question of negligence, and of the degree of care required of both appellant and the deceased, and the instructions, as a whole, were as favorable to the defendant as the facts in the case warranted.

We find no reversible error in the record. The judgment is therefore affirmed; the costs of this appeal to be taxed against appellant.

304 Bartch, C. J., and Armstrong, D. J., concur.

Res Gestae are Those Circumstances which are the automatic and undisguised incidents of a particular litigated act, which are admissible when illustrative of such act, and which in contemplation of law are a part of the act itself: Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1, 105 Am. St. Rep. 558. The question of res gestae is discussed in the monographic note to People v. Vernon, 95 Am. Dec. 51-76, and in the recent cases of Scott v. State, 46 Tex. Cr. Rep. 536, 108 Am. St. Rep. 1032; Supreme Tent v. Port Huron Sav. Bank, 137 Mich. 627, 109 Am. St. Rep. 690.

The Doctrine of Assumption of Risks in the law of master and servant is discussed in the monographic notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 886-900; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 314-322.

STEWART v. GOLD AND COPPER COMPANY.

[29 Utah, 443, 82 Pac. 475.]

APPEAL.—Where the Findings on the Question of a conflict between mining locations are based upon maps and drawings from the land office, which are properly identified, authenticated and introduced in evidence, but which are not before the supreme court, such findings will not be reviewed. (p. 720.)

MINING CLAIM—Location by Alien.—The location of a mining claim by an alien is not void, but merely voidable. It can be attacked only by the government, and may be cured by his grant to a citizen. (p. 720.)

Stevens & Smith, for the appellant.

Whittemore, Bierer & Cherrington, for the respondent.

446 STRAUP, J. 1. Appellant applied for patent to the Sabine lode mining claim. Respondent, claiming to be the owner of the Panhandle, protested and adversed. The area of the two claims conflicted, and this action was brought to adjudicate these adverse claims. Trial before the court resulted in findings and a judgment in favor of plaintiff, respondent here. Appellant contends that the finding with respect to the location of the Panhandle, the discovery of a vein containing mineral, performance of assessment work, citizenship of Harrington, the locator, and especially the description of the area in conflict, are not supported by the evidence. We deem it unnecessary here to set forth what the record in detail shows as to the testimony and documentary evidence tending to support the findings. Suffice it to say that on examination of the record we are of opinion the evidence is sufficient to support the findings. Furthermore, as to the claim made that the finding describing the area in conflict lacks support, it conclusively is made to appear that the trial court had before it maps and drawings from the land office, properly identified and authenticated, which were admitted in evidence, and from which the boundaries of the two claims and the area in conflict were made to appear, but which maps

and drawings are not brought here, and are [447] therefore not before us. So that, as to this finding, the one most seriously complained of, whatever, if anything, there may be lacking by way of evidence to support the description as found, may well be presumed is contained and sufficiently made to appear by the said maps and drawings. What may seem uncertain and indefinite with respect to the evidence as to the description, the particular thing complained of, may well become certain and be made definite when the evidence is read in connection with the maps and drawings.

2. The Panhandle was located by Harrington, who conveyed to Stewart, the respondent. It is conceded that the evidence shows Stewart was a citizen; but it is claimed the evidence is wanting that Harrington was a citizen. It is said the proof of his citizenship rests entirely on hearsay. Conceding, without deciding, that hearsay testimony, although admitted without objection, is no legal evidence upon which a finding may rest, still it is now settled law that a location of a mining claim made by an alien is not void, but only voidable, and may be cured by his grant to a citizen, and that a location made by an alien is free from attack by anyone except the government: 1 Snyder on Mines, secs. 263, 267; 1 Lindley on Mines, secs. 233, 234; McKinley Min. Co. v. Alaska Min. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331; Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532.

Not anything has been made to appear to us why this judgment should be reversed. It therefore is affirmed, with costs.

Bartch, C. J., and McCarty, J., concur.

Mineral Lands are open to location only by citizens of the United States, or persons who have declared their intention to become such: Justice Min. Co. v. Lee, 21 Colo. 260, 52 Am. St. Rep. 216; Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786. The question of citizenship, however, can be raised only by the government: Wilson v. Triumph Con. Min. Co., 19 Utah, 66, 75 Am. St. Rep. 718. And a conveyance by an alien to a citizen is good: See the monographic note to McClintock v. Bryden, 63 Am. Dec. 107. Consult, also, Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786.

CASES

IN THE

SUPREME COURT

OF

WEST VIRGINIA.

GEORGE v. ZINN.

[57 W. Va. 15, 49 S. E. 904.]

APPEAL—Bill Confessed—Errors Reviewable.—An appeal from a decree upon a bill taken for confessed, after the overruling of a motion to correct it, specifying certain errors therein and charging generally the existence of others, brings before the appellate court all of the errors of law in the decree. (p. 724.)

TRUST DEEDS—Sales Under Aid of Equity.—A trustee in a trust deed cannot resort to a court of equity to have a sale made under its decree instead of selling under the power contained in the trust deed, unless he shows such impediment to the exercise of the power as renders it inequitable for him to proceed without the aid of the court. (p. 725.)

TRUST DEEDS—Sales Under—Uncertainty of Liens—Aid of Equity.—The existence of liens, prior or subsequent, or both, on land to be sold under a trust deed, constitutes no impediment to the execution of the power of sale contained therein by the trustee without the aid of equity, unless such uncertainty, dispute or controversy as to the amounts or priorities of such liens is shown as may deter bidders from offering full and fair prices for the property. (p. 728.)

TRUST DEEDS—Sales Under—Aid of Equity.—The possibility of a right of subrogation and marshaling of assets in the trust creditor desiring a sale under his deed of trust confers upon the trustee no right to the aid of a court of equity in the execution of the power of sale vested in him by the trust deed. (p. 731.)

TRUST DEEDS—Powers of Trustee.—The powers of a trustee under a trust deed are limited and defined by the instrument under which he acts, and he has only such powers as are thus expressly conferred upon him, together with such incidental and implied powers as are necessarily included therein. He does not control the debt secured nor represent the creditor for all purposes in the collection of the debt, nor can he assert the equities, rights, and powers of such creditor against other creditors. (pp. 731, 732.)

Talbot & Hoover, for the appellants.

W. T. George, for the appellee.

[16] POFFENBARGER, J. In the disposition of this appeal, all the questions which it is necessary to determine may

be resolved into the following: "1. When a motion in the trial court to correct errors in a decree upon a bill taken for confessed, made as a preliminary step to the taking of an appeal, from such decree, specifies certain alleged errors therein and contains a general charge of other errors apparent on the face of the record and decree, does it affect errors not specifically pointed out? 2. Does a prior judgment lien, a prior vendor's lien, which is alleged, and subsequently shown, to have been satisfied, and subsequent trust deed and judgment liens, constitute an impediment to a fair execution of the powers of a trustee in a deed of trust, executed to secure a debt, authorizing a resort by him to a court of equity for relief? 3. Does a prior judgment lien, covering not only the lot on which the trust deed is secured, but other real estate, constitute such an impediment?"

W. T. George, as trustee in a certain deed of trust, executed by Nannie E. Zinn and A. W. Zinn, her husband, to [17] secure, upon a town lot owned by Mrs. Zinn a note for fifteen hundred dollars, executed by the grantors to H. A. Monahan, brought this suit in the circuit court of Randolph county, to have the liens on said lot adjudicated as to their amounts and priorities, alleging the lack of such ascertainment to be an impediment to the exercise of the power of sale vested in him by the deed. His bill shows the reservation of a lien for three hundred and fifty dollars in one of the deeds by which the lot was conveyed to Mrs. Zinn, which it avers has been satisfied, and as to the discharge of which it does not charge the existence of any controversy, dispute or doubt, and a small judgment lien in favor of A. D. Barlow, which is ultimately found to amount to eighty-five dollars and twenty-four cents, both prior to the deed of trust. It then shows a subsequent, unsatisfied deed of trust, executed to W. T. W. Morgan, trustee, securing, on the same lot, the payment of two notes for five hundred and twenty-two dollars and seventy-five cents, each in favor of Cutright Bros., and two satisfied judgment liens of still later date, and charges that there may be other liens of which the plaintiff is ignorant Of the interested parties, Nannie E. Zinn, A. W. Zinn, A. D. Barlow, Dora T. Gall, who had held the vendor's lien, and W. T. W. Morgan, trustee, only, were made defendants. Monahan, the creditor in the first deed of trust, and Cutright Bros., creditors in the other, were not made parties at all.

Mrs. Zinn owns another lot, conveyed to her by C. F. Teter and wife by deed, dated August 30, 1898, and reserving a vendor's lien for seven hundred and fifty dollars of purchase money. On this the Barlow judgment is a lien and the Cassell judgments had been liens. The bill does not show any other liens upon it, but, from the commissioner's report and the decree, it appears that there were other subsequent liens. On account of the inclusion of this lot in the bill, Charles F. Teter was made an additional party defendant.

Though the bill does not say so, it appears from the commissioner's report and decree and the exhibit filed with the bill, that A. W. Zinn, the husband of Nannie E. Zinn, owned a third lot which has been drawn into the proceedings. From the bill and exhibits, it appears that, on the eighteenth day of September, 1891, A. W. Zinn and wife conveyed this lot to I. P. Russell, trustee, to secure the payment of a note for one hundred and fifty dollars, executed by A. W. Zinn to A. D. Barlow. On account of this deed of trust on this piece of property, Russell, [18] as trustee, is made an additional party defendant. Of course the judgment in favor of Barlow against A. W. Zinn and Nannie E. Zinn, dated March 20, 1897, is a lien upon this piece of property as well as upon Mrs. Zinn's, and the Cassell judgments had been liens upon it. The commissioner's report and decree show a number of other subsequent judgment liens upon it, some of which were against A. W. Zinn alone, and some against him and Nannie E. Zinn.

Mrs. Zinn made no appearance in the case. There was a reference to a commissioner who reported all the liens and their amounts and priorities. By the decree made and entered on the fourth day of May, 1903, the report was confirmed, the liens fixed upon the property and a sale directed to be made by W. T. George, who was appointed a special commissioner for that purpose, in case of default in payment of the liens.

Pursuant to notice, Nannie E. Zinn, on the twelfth day of October, 1903, filed her petition, praying that the decree be set aside and the errors and insufficiencies in the decree and the record be corrected. Thereupon the court suspended the sale until further order, and, on the twenty-first day of October, 1903, sustained a demurrer to her petition, dismissed the same and refused to set aside the decree or correct any errors therein.

The first error specifically assigned was failure to make C. H. Scott, trustee, W. C. Ward, B. L. Butcher, trustee, A. G. Dayton, trustee, Jennie Zinn and J. C. Arbogast, parties. This specification was founded upon testimony taken before the commissioner, showing that there had been certain deeds of trust on some, or all, of the property, which had been satisfied by payment. Whether they were prior or subsequent, or on what particular lots they had existed, does not appear anywhere in the record. The second assignment is based upon the failure to make Cutright Bros. parties, and the third on the failure to make Monahan a party. The fourth was based upon the failure to ascertain, before decree, the rental value of the property, and the fifth asserted that it was error to decree a sale of any of the lands except the lot upon which the plaintiff held his lien. These specifications were followed by a general charge that there were many other errors apparent upon the face of the record and decree.

[19] A motion to correct errors in a decree upon a bill taken for confessed, under section 5, chapter 134, must, from its nature, be as broad and efficacious as an appeal, for it is essentially a substitute for an appeal, since section 6 of the same chapter forbids an appeal for any error which may be corrected on such motion, until after it has been made, and said section 5 provides that, on such motion, the court in which the decree was rendered, or the judge thereof in vacation, may reverse it for any error for which, but for the prohibition in section 6, an appellate court might reverse it, and give such decree as ought to be given. This makes the power and duty of the court or judge on such motion coextensive with the powers and duties of the appellate court upon an appeal. Hence, an appeal after the refusal of the court below to correct, upon a petition pointing out certain errors and charging the existence of others, brings up the whole decree, as to all errors of law, as fully as does an appeal in any other case. In such cases no issues of fact are involved, for none have been made: Camden v. Farrel, 50 W. Va. 119, 40 S. E. 368. Here, the petition specifies certain alleged errors and then charges others apparent on the face of the decree and proceedings. How can we assume that none save the errors specifically pointed out were insisted upon in the court below? The defect of want of necessary parties, broad as a demurrer to the bill would have been, striking at the basis of the entire suit, was brought to the attention of the

court below and is now relied upon here as the principal assignment of error.

Before entering upon any consideration of this ground of error, it is deemed proper to advert to a more serious defect in the bill which, though not mentioned in the briefs, cannot escape the notice of the court, since it is apparent upon the face of the record, and is a matter of such substance, that, being noticed, it ought not to be passed over in silence. It is well settled that this court does not limit its investigations to the errors assigned, unless it is apparent that all others have been waived: Rule 5, sec. 3. Nothing appears from which it can be safely inferred that any defense has been waived. On the contrary, the bill, constituting the foundation of the whole structure, is attacked. Since we are called upon to examine it and pass upon its sufficiency, it is, to say
20 the least, not improper to give it full and thorough consideration.

The extent to which a trustee will be permitted to resort to a court of equity for the removal of impediments to a fair and just execution of his power of sale has never been clearly defined by this court. It would be more accurate to say that no rule has been established by which to determine what is, and what is not, such an impediment. In Spencer v. Lee, 19 W. Va. 179, Judge Patton, speaking of the duties and powers of a trustee, lays down this proposition: "He is supposed to be the common friend and agent of both parties, impartial and disinterested, whose duty it is to act justly and discreetly toward those in interest. In order that the trustee may thus act, a court of equity is always open to him, when the amount due by the deed is uncertain or is in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when for any reason a sale is likely to be accompanied by a sacrifice of the property, which at the cost of some delay may be obviated." The use of the words, "when for any reason a sale is likely to be accompanied by a sacrifice of the property," does not indicate what particular circumstance would constitute a reason for such sacrifice. Reference to the cases cited in support of the proposition reveals the fact that in all of them there was some matter of controversy as to the state of the title, the amount of the debt due, or a conflict as to priority or amounts of liens. Not one of them asserts that the mere existence of one or more prior liens upon the property, undis-

puted in any sense or to any extent whatever, constitutes any obstruction or impediment to the exercise of the power of sale. A cloud upon the title, or a question as to whether some lien upon the property other than the one created by the deed of trust under which the sale is about to be made, is prior or subsequent to the trust deed lien, or a question as to whether or not the apparent prior lien is valid, or has been satisfied, in whole or in part, would create a state of uncertainty as to what the purchaser would obtain for his money, and thereby prevent him from bidding the amount which the property is, in his opinion, worth. He, of course, would want a clear title, legal or equitable, without any encumbrances, uncertain in amount. He would want no uncertainty [21] as to the amount of the prior liens, for his purchase would be subject to them. But if there is no uncertainty as to the amount of such liens, and no cloud upon the title, and no controversy as to whether some debt is prior or subsequent to the one for which the sale is being made, there is nothing to deter him from bidding what, in his judgment, the property is worth. He takes it subject to the prior liens: Crumlish v. Shenandoah etc. R. R. Co., 32 W. Va. 244, 9 S. E. 180; Fleming v. Holt, 12 W. Va. 143. They, together with the amount bid by him, constitute the whole cost of the property to him. That the mere existence of prior liens, not shown to be disputed as to their validity or amounts, or as to whether they are in fact prior, do not constitute any impediment to a fair execution of the trust, has been decided by this court in Curry v. Hill, 18 W. Va. 370, holding that: "Where the amount of the prior liens is certain and ascertained, the sale of the equity of redemption is proper." In that case the court dismissed the bill filed by the debtor himself, predicated upon the theory that a fair sale could not be made because of the existence of prior trust deed liens. There had been no adjudication as to either the amounts or priorities of the liens. The defect of the bill was that it failed to show that any of them were controverted by anybody in either of these particulars. Judge Johnson said the amount of the prior lien being certain and ascertained, the sale of the equity of redemption under the last trust would be proper. Judge Snyder so understood the rule, for he so states it in Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775. His language is: "The facts in this case do not show that there was any such controversy or uncertainty about the title of the property or

the amounts and priorities of the debts as would have justified the trustees in resorting to a court of equity, much less do they show any right on the part of the debtor to set aside a completed sale made by the trustees." In the preceding paragraph he had discussed the conditions under which a trustee is required to delay sale pending a removal of impediments. In Shurtz v. Johnson, 28 Gratt. 657, the rule is stated as understood and declared in Curry v. Hill, 18 W. Va. 370, and Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775. In that case there were both prior and subsequent liens, but there was no dispute, and the court held that the trustees had violated no duty in selling without having [22] had the liens adjudicated. It is to be observed that all the references to liens in all the cases are as to the amounts and priorities thereof, and uncertainty as to amount or priority. Nowhere has it been declared that the mere existence of liens necessitates or justifies a suit in equity.

A comparatively recent case is Muller's Admr. v. Stone, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223, which declares a limitation upon the rule to be that there must be some controversy, some dispute, which stands in the way of a just and fair sale. The liens in that case were junior, but that does not alter the rule. The decision rests, not upon the ground that they are junior liens, but upon the ground that it does not appear that there is any uncertainty about them, so as to make it necessary to resort to a court of equity for their ascertainment. Lewis, President, concludes by saying: "But it is not the duty of the trustee in every case to invoke the aid of a court of equity before making a sale of the trust subject, where there are liens thereon; and to hold that he is, or that if he fails to do so an injunction will be awarded at the instance of any party in interest as of course, would be to impose serious delays, involving costs and expense, in the execution of deeds of trust, which the law never contemplated, and without promoting the interests of either creditor or debtor." Proceeding, the learned judge becomes more emphatic and says: "It is only when the aid of a court of equity is necessary that it ought to be applied for; and it is only in such a case that its aid will be extended. If there are no real impediments in the way of a fair execution of the trust, then its aid is not necessary, and the costs of a law suit ought not to be added to the ordinary cost of executing the trust."

This principle is well illustrated in Hogan v. Duke, 20 Gratt. 244, which, however, did not involve any question of liens. The debtor attempted to enjoin the sale upon the ground of uncertainty as to the amount due under the deed of trust, it appearing that he was entitled to two credits of one hundred and fifty dollars each, both of which were conceded and had never been denied by the creditor. He claimed a further credit for some oats, potatoes, lumber and other articles. The answer denied that he was entitled to this last credit, and his bill as to that point was unsustained by proof. The court held that he could not maintain the suit on the ground [23] of uncertainty, but did remove the trustee because he had been declared bankrupt. Judge Moncure, speaking for the court, said: "There was no uncertainty as to the amount of cash payment to be so made. It could be made certain by a simple statement from materials furnished by the decree. Still less was there any uncertainty as to the amount necessary to be paid to prevent any sale at all under the trust deed or under the decree. That amount was the balance due on the trust debt and expenses already incurred in the part execution of the trust."

It may be asked whether, if a purchaser at a sale under a deed of trust buy a piece of property on which there is a prior lien, he may, upon paying off that lien, have a right of action on the covenants in the deed of trust, or by way of subrogation, against the debtor, to recover back the money paid out in discharging the prior lien, so that the ultimate price of the property to him is not the amount of his bid plus the prior liens, but the aggregate less whatever sum he may so recover back; and whether this does not introduce an element of uncertainty into the bidding, to the injury of the debtor. It does not, for the obvious reason that, if any such prospective right of action exist, a question which need not be here determined, it is common to all the bidders, and its value not necessarily difficult of ascertainment. Judgments and other claims, secured and unsecured, are subjects of daily barter and sale. If one bidder may be supposed to make an allowance for such contingent recovery, the supposition holds good as to each of the others. At any rate, the courts have never recognized such possible recovery back as an element of uncertainty, and certainly not as an existing controversy. In Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775, quoted above, Judge Snyder says there were two

trust deeds prior to that of Fisher under which the sale was made. Curry v. Hill, and other cases cited, in which there were prior liens, clearly preclude any ground of equity jurisdiction. Though a prior lien may be, in some sense, a cloud on the title, these cases undoubtedly hold it not to be such a cloud as constitutes an impediment to a fair execution of the power of sale. Nor is it to be classed with an outstanding legal title, hostile to both creditor and debtor, affecting the whole subject of the sale, such as existed in Rossett v. Fisher, 11 Gratt. 492.

[24] Two cases decided by this court seem to proceed upon a principle contrary to what is here stated, but they do not go so far as to declare that the mere existence of liens gives the right to resort to a court of equity. They are Keck v. Allender, 37 W. Va. 201, 16 S. E. 520, and Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810. In the former, the debtor made no resistance to the bill. Its sufficiency was never tested. The suit started with an acceptance of service of process and an order of reference by consent. The only controversy in the case arose between two creditors, both of whom desired an adjustment of the conflict between their liens. That case, however, would be no exception to the rule, because of this conflict and dispute between the lienholders. Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810, in its declaration of principles, goes far beyond the case decided, and beyond any former decision of this court or the Virginia court, or any other court so far as has been discovered. Point 8 of the syllabus says: "Where there is from any cause an impediment to his making a fair and proper sale, (1) as where, from the fact of the deed of trust being one of long standing, or from any cause, the amount due and to be raised by a sale is uncertain; (2) where there are various deeds of trust or other encumbrances; (3) where the legal title is outstanding; (4) where there is a cloud upon the title—the trustee may, of his own motion, apply to a court of equity to remove such impedient to a proper execution of the trust; and if he should fail to do this, the party injured by this default has a right to make such application." In that case the deed of trust under which the sale was sought to be made was the last one of four, and it recited that it had been given for the amount due upon the three former ones, so that in fact there was but one debt. The court expressed a doubt as to whether the cred-

itor was bound by this recital, and as to whether or not the legal title might not be outstanding. Hence the decision does not proceed upon the ground of undisputed encumbrances, and a re-examination of its soundness as regards the sufficiency of its allegations respecting uncertainty in the debt, and as to the effect of an outstanding legal title, need not be inquired into, though it may be remarked, as to the outstanding legal title in a trustee in a prior deed of trust, as an independent ground of equitable relief in such case, if it was intended to say that it is sufficient, [25] that the case is in direct conflict with the decision in Curry v. Hill, 18 W. Va. 370. The obiter dictum on the subject to encumbrances immediately precedes a citation of Horton v. Bond, 28 Gratt. 815, and Cole's Admr. v. McRae, 6 Rand. 644. Both of these were judgment lien creditors' bills to enforce the liens and set aside fraudulent deeds. Neither of them, in any degree, supports the suggestion ventured.

It is difficult to perceive any reason for allowing a resort to expensive litigation for the accomplishment of that which the parties can do themselves. Courts were instituted to give relief in those instances in which there are differences, disputes, controversies, to settle. It is contrary to fundamental principles of law to allow a man to have the aid of a court when his situation is such that he does not need it. The business of courts is to hear and determine controversies, not to make calculations for people or advise them in ordinary business transactions. For the purpose of allowing a useless and expensive proceeding, the law does not presume that, in cases of public sales, men will not ascertain for themselves plain, open and undisputed facts, nor that they do not have the capacity to do so. Neither will it be assumed that they are ignorant of the law, the facts being known, or presumed that men will not recognize each other's legal rights, or that controversies exist or will arise. These things must be made to affirmatively appear.

It may be supposed that, because the prior judgment lien covers two lots owned by Mrs. Zinn and one owned by her husband, this gives equity jurisdiction. It might afford a basis for a bill by Monahan, the creditor. Conditions may be such as to enable him to say to the judgment creditor, "As you have two securities for your debt and I have but one, and that is insufficient to pay both your debt and mine,

you shall first resort to the other piece of property." Under some circumstances, a creditor may do this. Without intending to intimate that Monahan may, under the circumstances of this case, do so, it is clear that, if anybody can do it, in respect to his debt, it must be himself. It affords no ground for a suit at the instance of a trustee. His duties are prescribed and defined by the deed of trust under which he is acting: Crumlish v. Shenandoah etc. R. R. Co., 32 W. Va. 244, 9 S. E. 180. He is not the general representative of Monahan, as regards [26] his debt. His duty is only to sell in case of default. His only right to resort to a court of equity, if he has any, is incidental to that power of sale. It can only be done for the purpose of removing impediments to that sale, and if none exist (and his bill fails to show that any do), then he has no right to bring such suit. He has no right to collect the debt as trustee, except in the event of the sale of the property by him. To hold that the trustee in the deed of trust represents the creditor for all purposes in the collection of the debt would extend his powers far beyond the limits fixed by the instrument under which he holds, and would have the effect of depriving the creditor of the control of his debt. He could subject him to useless costs, prosecute unsuccesssful suits, and compel the creditor to undergo unnecessary delay. That is clearly not the office of such trustee.

The principle or rule which might give right to this trust creditor or other junior encumbrancer of the lot, on which the trust lien is, to compel the judgment lienor to resort to the other lot, is that which requires the marshaling of funds, securities or assets, founded upon the principle of subrogation. This is never enforced at the instance of the common debtor: Sheldon on Subrogation, 64; McDevitt's Appeal, 70 Pa. St. 373; Butler v. Stainback, 87 N. C. 216; Plain v. Roth, 107 Ill. 588; Witherington v. Mason, 86 Ala. 345, 11 Am. St. Rep. 41, 5 South. 679. It applies only as between creditors of a common debtor: Plain v. Roth, 107 Ill. 588; Lee v. Gregory, 12 Neb. 282, 11 N. E. 297. Since the rule does not operate at all in favor of the debtor, how can it be said that the trustee may base a suit upon it for his benefit? As his only duty to the creditor is to sell the property in such manner as not to sacrifice it, he clearly has no right to represent him in the assertion of equities

against other creditors. Would a suit, after sale under the deed of trust, to shift the whole or part of the Barlow judgment onto the other lot, assuming that conditions are such as to warrant a marshaling of assets, injure or prejudice the purchaser? Not to any extent whatever. The lot is bound for the entire judgment. The judgment creditor may enforce it against either lot, unless prevented from doing so by some other creditor asserting against him the two fund rule, and if no such claim is set up before he obtains satisfaction, it cannot [27] be asserted against the land at all, but may go against the fund collected by the judgment creditor: Sheldon on Subrogation, secs. 62, 66. Clearly, the purchaser takes the land subject to the entire amount of the judgment, and the only open question is whether he shall ultimately pay all of it or any of it to the prior creditor, or to other creditors who may marshal the assets against the former. As to the amount of that judgment, the purchaser becomes a stakeholder. He must know he is liable to somebody for the whole of it, and he is presumed to be governed by that in his bidding. Therefore, it creates no uncertainty as to what the purchaser must pay or as to what he buys, and cannot work any sacrifice of the property.

If the power of sale can, in view of our statutory regulations, be treated as a cumulative remedy, so as not to deprive the creditor of his suit to enforce the lien of his trust deed, this gives the trustee no right to prosecute such suit, for the terms of the deed conferring his authority do not go that far.

The bill in this case sets up no question about the amount of any lien, prior or subsequent, nor any about the order in which they, or any of them, are to be satisfied. As to those which are alleged to have been paid off, it is not shown that the fact is denied, or that the trustee or anybody else has made any inquiry about them. Such an injury would involve less time and expense than a judicial investigation of matters which, in no sense of the terms, call for judicial determination. The paragraph of the bill which it is supposed was intended to show how the trustee is hampered and obstructed reads as follows: "Plaintiff further says that owing to all of the aforesaid judgments appearing of record and the aforesaid deeds of trust, that it is impossible for him to proceed in the enforcement of the trust for the col-

lection of the debt due to said Monahan, by advertising and selling the property as provided for in said deed of trust, and therefore he avers that he has a right to file a bill in equity for the purpose of having the court to ascertain what portion of the aforesaid debts have been paid, and what amount thereof remains unpaid, in order that the property when sold may sell more readily and to better advantage for the creditors."

28 Though the deed of trust empowers the trustee to sell only upon the request of the creditor, the bill does not aver that any such request has been made. If the creditor were a party, this defect might be cured by his acquiescence in the proceedings, but he is not a formal party and it does not affirmatively appear that he ever presented any claim to the commissioner. Whether that officer ascertained and reported the debt from the bill and exhibits alone, or from them and a claim presented by Monahan, cannot be determined from the record. If there were a presumption that he did, it might be overcome by the fact that the debt is decreed to W. T. George, trustee, and not to Monahan: See Bryan v. McCann, 55 W. Va. 372, 47 S. E. 143.

The general rule in equity is that all persons interested in the subject matter of a controversy are necessary parties. For the appellee here, the application of this rule to the case in hand is virtually admitted, but it is insisted that the defect has been cured by the appearance of all the interested parties before the commissioner, since his report ascertains and presents their claims. Whether this position is sound need not be determined, because, for defects in the bill, the whole structure of the suit falls, and we will not assume that necessary parties will be omitted from any future proper proceeding.

The bill, in its present form, being wholly devoid of equity, the decree must be reversed and the cause remanded, with leave to the plaintiff to amend, or have his bill dismissed without prejudice, as he may elect.

Sales by Trustees, including sales under powers in mortgages and trust deeds, are discussed in the monographic notes to Houston v. National etc. Loan Assn., 92 Am. St. Rep. 573-598; Tyler v. Herring, 19 Am. St. Rep. 266-297. It is not the duty of a trustee under a deed of trust in every case to invoke the aid of a court of equity before making sale of the trust estate, simply because there are liens thereon. Such duty devolves upon him only when such aid is necessary to remove some impediment to a fair execution of the trust: Hudson v. Barham, 101 Va. 63, 99 Am. St. Rep. 849.

COBB v. GLENN BOOM AND LUMBER COMPANY.

[57 W. Va. 49, 49 S. E. 1005.]

TRIAL—Motion to Exclude Evidence.—On a motion to exclude all of plaintiff's evidence, the court should be guided by what its action would be if the case were submitted to the jury and they should find a verdict in favor of the plaintiff upon such evidence. If it would be the duty of the court to set aside such verdict for want of sufficient evidence, it should sustain the motion and instruct the jury to find for the defendant; but if the evidence is such that the court must refuse to set aside the verdict, the motion to exclude the evidence should be overruled. (pp. 736, 737.)

CONTRACTS by Telegraph—Statute of Frauds.—A contract for the sale of lands may be made by means of telegrams, and if they refer and directly relate to one another, so as to fairly constitute one paper, and are signed by the parties or their agents, and it appears from them that the minds of the parties met and that the terms of the contract clearly appear, this is a sufficient compliance with the statute of frauds. (p. 738.)

CORPORATIONS—Contract by Telegrams—Power of Officer.—The secretary of a corporation has no power by virtue of his office alone to make a contract for the sale of the lands of the corporation, and if he makes such sale by means of telegrams, the corporation is not liable thereunder unless he had, at the time, express authority to make such sale, or was held out by the corporation in such a way as to make it apparent that he had such authority, or unless the contract of sale was ratified by the corporation. (pp. 739, 740.)

AGENCY—Authority of Agent—Presumption.—Everyone who deals with an agent is presumed to know the extent of his authority, and if he exceeds his express or apparent authority, his acts bind only himself, but not his principal, unless ratified by the latter. (p. 740.)

TELEGRAMS—Originals.—The message sent to a telegraph office to be transmitted in reply to one received is the original, and not the message received at the place to which it is transmitted. (pp. 740, 741.)

EVIDENCE—Telegrams.—Whether a copy of a telegram or the original is sought to be introduced in evidence it is necessary that its genuineness and that it was written and sent by the person whose name it bears be shown, before it becomes competent evidence. (p. 741.)

W. B. Maxwell and J. P. Scott, for the appellant.

A. J. Valentine and L. Hansford, for the appellee.

50 SANDERS, J. This is an action of assumpsit brought in the circuit court of Tucker county, wherein the plaintiff claims that he entered into an executory contract with the defendant by which he purchased from it eight hundred acres of land, lying in Randolph county, at fifteen dollars per acre,-and that after the making of said contract the defendant sold the timber on said land to another person,

thereby rendering it impossible for it to carry out its contract with him; and claiming damages in the sum of five thousand dollars. The defendant pleaded nonassumpsit, and filed an affidavit denying that it signed or authorized the signing of the telegrams in the declaration mentioned, and upon this issue the case was tried. After the plaintiff introduced all his evidence, the court, upon motion of the defendant, excluded it from the jury, and instructed them to find a verdict in favor of the defendant. The jury returned a verdict as instructed, and the court rendered judgment thereon, and it is this judgment that we are now asked to review.

The right of the courts in this state to exclude the evidence from the jury and to peremptorily instruct a verdict in favor of the defendant has been for many years well settled, but it was not until the decision in the case of Ketterman v. [51] Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683, that a well-defined and proper test was made for the guidance of the courts, for the decisions previous thereto, while they all recognized the well-settled practice to be that the defendant had the right to make such motion, and the province and duty of the court to sustain it in any proper case, yet the difficulty has been when such a motion should prevail, and by what rule the court is to be guided. Judge Green holds, in the case of Franklin v. Geho, 30 W. Va. 27, 3 S. E. 168, that a motion to exclude all the plaintiff's evidence and direct a verdict for the defendant is equivalent to a demurrer to the evidence, and Judge Holt, in the case of Bon Aqua Impt. Co. v. Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771, holds that a motion to exclude or strike out evidence is not, in all cases, the equivalent of a demurrer to the evidence, and that it should not, without modification, be permitted to supersede and replace such demurrer, and then again in the same book, the case of Wheeling Bridge Co. v. Wheeling etc. Bridge Co., 34 W. Va. 155, 11 S. E. 1009, Judge Lucas holds that a motion to exclude the plaintiff's evidence ought to be overruled where the court cannot grant the same without usurping the functions of the jury. And then, in Carico v. West Virginia Cent. etc. Ry. Co., 35 W. Va. 389, 14 S. E. 12, it is held that a motion to exclude the plaintiff's evidence on the ground that it is insufficient to warrant a verdict should not be granted if there be any evidence which tends in any

degree, however slight, to prove the plaintiff's case; and in the case of Henry v. Ohio River R. R. Co., 40 W. Va. 234, 21 S. E. 863, it is laid down, in the ninth point of the syllabi, "Whenever the evidence tends in a fairly appreciable degree to sustain the plaintiff's action, the court must not strike out the evidence or direct a verdict for the defendant." Also Guinn v. Bowers, 44 W. Va. 507, 29 S. E. 1027, the rule is laid down to be that a motion to exclude plaintiff's evidence on the ground that it is insufficient to warrant a verdict will not be granted if there be any evidence which tends, in any degree, however slight, to prove his case. Therefore, it will be seen from these various decisions that in some it is held that the motion to exclude should be treated as a demurrer to the plaintiff's evidence; and in the case of Bon Aqua Impt. Co. v. Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771, it is held that in all cases it is not the equivalent of a demurrer to the evidence, and then in others, that if there be any evidence [52] tending in any degree, however slight it may be, to make out the plaintiff's case, the motion should be overruled; and then, again, we find that in some it says that if there is any evidence tending in any appreciable degree to establish the plaintiff's contentions, that the court should not exclude the evidence. The question as to when evidence tends in any appreciable degree to support the plaintiff's claim is very difficult to determine. What is meant by "appreciable degree" in passing upon questions of this kind is hard to define, and then to say that a court should not exclude the evidence because there is some evidence, no matter how slight it may be, to make out the plaintiff's case, means that the court shall submit many cases to the jury for its decision, when, at the same time, it is perfectly apparent that if the jury should find a verdict for the plaintiff that the court will be compelled to set it aside because contrary to the evidence. It seems contrary to good reason to say that when the plaintiff has introduced all of his evidence and from that evidence the court could not sustain a verdict in his favor, that the court should overrule a motion to exclude the evidence, and continue the trial of a case without merit. The proper test is, that when a motion is made to exclude the plaintiff's evidence, the court should be guided by what its ruling would be should that evidence be submitted to the jury, and upon

it the jury find a verdict in favor of the plaintiff. If it would be the duty of the court to set aside the verdict because manifestly contrary to the evidence, then it is the duty of the court to exclude it from the consideration of the jury, and instruct them to find in favor of the defendant. This question was discussed by Judge Brannon in delivering the opinion of the court in the case of Ketterman v. Dry Fork R. R. Co., 48 W. Va. 606, 37 S. E. 683, and while he did not expressly lay this rule down to be the true test, yet he substantially held it to be so.

We look to the evidence to see whether or not the court did right in excluding the plaintiff's evidence. To establish his case plaintiff relies upon certain letters and telegraphic communications, which, in order to get a more complete understanding of the case, are here given in extenso:

"Sunbury, Pa., Nov. 25, 1901. W. H. Cobb, Esqr., Elkins, W. Va. Dear Sir:—Your valued communication of 22nd inst. just at hand. We realize that the point you make [53] regarding the difficulty of working our whole tract from one side, is probably well taken, and for that reason we have no objection to making sale of the land laying on the Otter Creek side & Shafers Fork side separately. But we do not think the price you offer ($12.50) per acre for the land on Otter Creek side is sufficient for it. You know this tract is exceptionally well timbered and will not grow less with time. Besides the coal question should be taken into consideration to a certain extent. We feel positive there is coal in paying quantities on this tract, although we have not had it opened up. Yours truly, Glenn Boom & Lumber Co. per W. H. Sager, Secty."

"Elkins, W. Va., Nov, 27th, 1901. To W. H. Sager, care Glenn Boom & Lumber Co., Sunbury, Pa. Wire best cash price on Otter Creek land. My offer about limit. W. H. Cobb."

"Sunbury, Pa., Nov. 27th, 1901. Fifteen dollars. W. H. Sager."

"Elkins, W. Va. Nov. 27th., 1901. To W. H. Sager, care Glenn Boom & Lumber Co., Sunbury, Pa. Will take Otter Creek land at price named. W. H. Cobb."

"Sunbury, Pa. Nov. 28th., 1901. To W. H. Cobb, Elkins, W. Va. Our Mr. Chester will reach Elkins Monday to consult with you. Letter to-day. W. H. Sager."

"Sunbury, Pa., Nov. 28th, 1901. W. H. Cobb, Elkins, W. Va. Dear Sir: Your Teleg. of 27th rec'd. Our Mr. Chester will reach Elkins about Monday evening to arrange terms of sale with you and enter into agreement with you if satisfactory all around. Yours truly, W. H. Sager, Secty Glenn Boom & L. Co."

The court sustained the objection to the introduction of all the telegrams, except the first one mentioned, sent by the plaintiff to Sager, care of the defendant, inquiring the price of the land, and also sustained the objection to the introduction of the letter dated November 28, 1901. But we will first look to see if from these letters and telegrams the plaintiff has shown such an executory contract as he could specifically enforce, for this is the basis of his action, and without establishing such a contract as he could, in a court of equity, specifically enforce against the defendant for the sale of said land, he would not be entitled to recover in this action. [54] Under chapter 98 of the code, a contract relating to the sale of real estate, to be binding, must be in writing, and signed by the party to be charged thereby, or his agent.

This brings us to the question, Is the contract made by the letters and telegrams such a one as meets the requirements of the statute of frauds above referred to? It is not necessary that the whole agreement should be written upon one piece of paper, but if it can be fully collected from various papers referring to one another or directly related to one another, such as letters and telegrams written and sent, and the replies thereto, so that they may be fairly said to constitute one paper relating to the contract, is a sufficient agreement, if it appears that the minds of the parties met, and if the terms of the contract, by referring to the various writings, can be made to clearly appear: Gaines v. McAdam, 79 Ill. App. 201; Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9; Brewer v. Horst, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; 27 Am. & Eng. Ency. of Law, 2d ed., 1092; 5 L. R. C. C. P. 295; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Story on Contracts, 1449.

While these letters and telegrams constitute a complete contract between the parties to them, yet, if they were written and sent by some person other than the one who is sought to be charged, it is necessary that the authority of the person writing and sending them should be shown. The defendant

filed an affidavit with its plea as provided by section 40, chapter 125, of the code, denying that it signed or authorized the signing of the telegrams which are claimed to have been received by the plaintiff. If not under the general issue, without such affidavit, certainly under this plea, verified by affidavit, the burden of proof was upon the plaintiff to show that W. H. Sager, in signing these telegrams, was authorized by the defendant to do so on its behalf. There is no such authority shown or attempted to be shown, except that the evidence shows that Sager at the time was the secretary of the defendant company, but does not show that he had any other connection with the defendant, or that he had authority to make the sale of the land in question. A secretary of a corporation, as such, has no authority to make contracts for it.

"The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. The [55] secretary is one of the corporate officers, but he has practically no authority. The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made": Cook on Corporations, sec. 717.

And then, Thompson on Corporations, section 4697, says: "The law does not ordinarily imply, in the secretary of a business corporation, the power ex officio to bind the company by means of letters or documents signed officially." And also, in Clark and Marshall on Corporations, section 704, we find: "Unless authority is expressly conferred, however, or he is clothed with apparent authority by being intrusted with the management of the business, or part of it, the secretary of the corporation has no authority to make any contracts on its behalf and in its name, or bind it by such acts. He has no such authority merely by virtue of his office."

The secretary not having authority by virtue of his office to make such a contract as is relied upon by the plaintiff for the basis of this suit, the defendant cannot be held liable by reason of the letters and telegrams sent by Sager, unless he had at the time express authority from the corporation to make sale of this land, or unless he was held out by the defendant in such a way as to make it apparent that he had such authority, or unless the contract was ratified by the defendant. Everyone who deals with an agent is presumed

to know the extent of his authority, and if he exceeds his express or apparent authority, his acts do not bind the principal, but only bind the agent, unless they have been ratified by the principal: Curry v. Hale, 15 W. Va. 867; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; Wells v. Michigan Life Ins. Co., 41 W. Va. 131, 23 S. E. 527; Rosendorf v. Poling, 48 W. Va. 621, 37 S. E. 555.

It is claimed that the letter of the twenty-fifth day of November, 1901, addressed to the plaintiff and signed by Glenn Boom and Lumber Company, per W. H. Sager, Secretary, shows that negotiations were pending for the sale of this land, and that the telegrams sent by Sager to the plaintiff in reply to the plaintiff's telegrams, having come from the proper place and the proper officer of the defendant, raises the presumption that they were directed to be sent by the defendant. There is no such presumption arising from the facts in this case. While the letter shows that it was signed by the defendant, per [56] Sager, Secretary, yet that does not show that Sager had authority to sign it, taking it that the letter is material to this controversy, which we think it is not, because, if a contract for the sale of this land was made, it was consumated by the three telegrams—the one asking the price of the land, the one in reply, quoting the price, and the one of the plaintiff accepting the proposition and agreeing to take the land, and none of these papers being shown to have been signed by the defendant or its authorized agent, the circuit court committed no error when it sustained the motion of the defendant to exclude the evidence and direct a verdict for it.

But even if Sager had been shown to have authority to make this sale for the defendant, the telegrams sent by Sager were not proper to be admitted as evidence, because their genuineness had not been shown. There is nothing to show that they had in reality been written and signed by Sager. From the authorities there is some difficulty in determining what are original telegrams within the meaning of the rule that the best evidence must be produced. "By the decided weight of authority the question whether the communication sent or the one received is to be deemed the original depends upon which party is responsible for its transmission; in other words, for whom the telegraph company is agent. If there is but a single communication, the dispatch as delivered at the place of destination is the best evidence. Of course,

there must be competent proof that the alleged sender did actually send or authorize the sending of the message in question. In proving a contract by telegrams, the best evidence is the telegram containing the offer as received at the point of destination and the dispatch containing the acceptance as delivered for transmission": Jones on Evidence, sec. 209.

Now, in this case, the plaintiff adopted the telegraphic system as a means for making the contract here relied upon and made inquiry of Sager as to what he would take for the land in question, to which Sager replied, giving him the price, which plaintiff accepted. Now, in accordance with the above authority, the best evidence is the telegrams of the plaintiff as received at their destination and the telegram of Sager at the place at which it was delivered for its transmission. But 57 then, again, there is no evidence, as we have noticed above, that Sager, in sending the telegrams, was acting as the agent of the defendant, and, of course, for that reason they were inadmissible. It is argued that the telegrams are without the jurisdiction of the court, and even if this is true, it does not authorize the introduction of copies of them until their genuineness has been shown, and the authority of the person sending them to do so. If such a message as the plaintiff claims was sent to him he could have shown the authenticity of it when delivered to be telegraphed to him, and then show, that, as it was delivered to the telegraph company, it was transmitted and delivered at the place of destination. But whether a copy is introduced or the original, it is necessary that the genuineness of it should be shown before it becomes competent evidence. "A dispatch or a copy of a dispatch purporting to have been sent by A B, as cashier, to C D, cannot be read in evidence without first proving that it was genuine paper—that is, that it was written and sent by the party whose name it bears": National Bank v. National Bank, 7 W. Va. 544. And also see Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Jones on Evidence, sec. 209. There being no evidence to show, or tending to show, that these telegrams which were claimed to have been sent by Sager were signed by him and delivered to the telegraph company for transmission, the court committed no error in rejecting them.

For the foregoing reasons we find no error in the judgment of the circuit court, and it must, therefore, be affirmed.

CONTRACTS BY TELEGRAPH AND THE ADMISSIBILITY OF TELEGRAMS AS EVIDENCE.

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I. Scope of Note.

The general scope of this note is sufficiently indicated by its title. The English and earlier American authorities on the branch of the subject relating to contracts by telegraph were discussed in the note to Trevor v. Wood, 93 Am. Dec. 514.

II. Status of the Telegraph Company with Respect to the Sender and Receiver of a Telegram.

In the consideration of the question whether a contract has been entered into by parties using the telegraph as a means of communication, or what the terms of the contract are, it is often important to know whether the telegraph company is to be deemed the agent of the person sending or of the person receiving the telegram. The question of agency is important where errors have occurred in the transmission of the message, thereby causing a loss to one of the parties using the telegraph to transact business.

The court in Ayer v. Western Union Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495, in discussing the question, observed: "This raises the question whether the message written by the sender and intrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

"The question is important, and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one, owning merchandise, writes a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the receiver of the offer may, in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receives instructions by telegraph from his principal, and in good faith acts upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there was an error in the transmission.

"It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that as between sender and receiver, the party who selects the telegraph as the means of communication shall bear

the loss caused by the errors of the telegraph. The first proposer can select one of the many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

"Of course, the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph."

But a telegraph company has no authority or agency from the person sending or to whom a message is sent to make, modify, or alter any agreement or proposition to buy or sell contained in the message received or transmitted or to bind a person sending or receiving such message: Pegram v. Western Union Tel. Co., 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 770.

Chief Justice Redfield, in discussing the question which message is the original, said: "In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or, in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry should first be made for the very dispatch delivered. In default of that, its contents may be shown by the next best proof. If the course of business is, as in the cities, to preserve copies of all messages received in books kept for that purpose, a copy might readily be obtained which would ordinarily be regarded as better proof than the mere recollection of a witness. And according to the early English and American practice, the party is bound to produce a copy of the original (that being lost), when in his power, and known, a sufficient time before the trial to enable him to do so: 1 Greenleaf on Evidence, sec. 84, and note.

"And perhaps if no copy of such message is preserved, but the original message ordered to be sent is preserved, that should be produced although this was not strictly the original in the case, the letter delivered, which was the original, being lost.

"But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it by way of copy or otherwise": Durkee v. Vermont Central R. Co., 29 Vt. 127.

And in Howley v. Whipple, 48 N. H. 487, the court said: "When a contract is made by telegraph, which must be in writing by the statute of frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the statute of frauds, because each party authorizes his agents, the company or the company's operator, to write for him; and it makes no difference whether that operator writes the offer or the acceptance in the presence of his principal, and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office."

Hence, the general rule is that the person who takes the initiative in using the telegraph as a medium of communication makes the telegraph company his agent for the purpose of communicating his message, and thereby renders the message delivered to the receiver the original message and not the message delivered to the telegraph company for transmission: Western Union Tel. Co. v. Shotter, 71 Ga. 760; Richmond Hosiery Mills v. Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290; Morgan v. People, 59 Ill. 58; Anheuser-Busch Brewery Assn. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575; Ayer v. Western Union Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105; Wilson v. Minneapolis etc. R. Co., 31 Minn. 481, 18 N. W. 291; Magie v. Herman, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909; Taylor v. Steamboat Robert Campbell, 20 Mo. 254; Dunning v. Roberts, 35 Barb. 463; Durkee v. Vermont Central R. Co., 29 Vt. 127; Saveland v. Green, 40 Wis. 431.

And the telegraph company is the agent of the person initiating correspondence for the purpose of receiving a reply by telegraph, where a telegraphic reply is expected by the person making use of the telegraph to conduct the correspondence: Bond v. Hurd, 31 Mont. 314, 78 Pac. 579; Cobb v. Glenn etc. Co., 57 W. Va. 49, ante, p. 734, 49 S. E. 1005. But it has been held that a telegraph company is the common agent of the parties at either end of the wire: New York etc. Tel. Co. v. Dryberg, 35 Pa. St. 298, 78 Am. Dec. 338.

But the court in Pepper v. Western Union Tel. Co., 87 Tenn. 554, 10 Am. St. Rep. 699, 11 S. W. 783, 4 L. R. A. 660, after an exhaustive review of the cases involving the question of agency and the question which message is the original, came to the conclusion that the mere fact of employment of a telegraph company to transmit his message does not make the company the agent of the sender so as to bind him upon a telegram negligently altered in the transmission, and that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent.

The court in the above case laid considerable stress upon the proposition that the question of altered message was not involved in some of the cases cited to the proposition that the telegraph company is ordinarily the agent of the person sending the message, and adverted to the fact that in some of the cases the question discussed was which message was the original message, the one delivered to the telegraph company for transmission or the one actually delivered, but we must confess that we cannot see wherein any usefulness would result from making any distinction as to which is the original message unless to guard against mistakes in the transmission of messages.

III. Right of Persons to Create Contracts by Telegraph.

The right of persons to create a contract by means of telegraphic messages is universally conceded: Calhoun v. Atchison, 4 Bush, 261, 96 Am. Dec. 299; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Utley v. Donaldson, 94 U. S. 29, 24 L. ed. 54. Contracts required to be in writing may be made by means of written telegrams: Western Twine Co. v. Wright, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438. Of course where letters and telegrams are employed by the parties, there is no contract unless the minds of the parties meet at the same time on the same terms: Sutter v. Raeder, 149 Mo. 297, 50 S. W. 813. Where the contract consists wholly of letters and telegrams, the question whether they constitute a contract is one of law for the court: James v. Marion Fruit etc. Co., 69 Mo. App. 207. In other words, the use of telegrams as evidence of the contract of the parties is governed by the same general rules which are applied to other writings: Saveland v. Green, 40 Wis. 431. There is in fact but little, if any, difference between the rules governing the negotiations of contracts by correspondence through the postoffice and communications by means of the telegraph: Minnesota etc. Oil Co. v. Collier etc. Co., 4 Dill. 431, Fed. Cas. No. 9635.

IV. What Telegrams Constitute a Sufficient Contract Between the Parties.

a. In General.—With respect to the general requirements of telegrams in order to constitute a contract, Judge Taft in Strobridge Lithographing Co. v. Randall, 73 Fed. 619, 19 C. C. A. 611, said: "Mr. Justice Foster, of the supreme judicial court of Massachusetts, speaking for that court in Lyman v. Robinson, 14 Allen, 242, said: 'A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation.' In Ridgway v. Wharton, 6 H. L. Cas. 238, Lord Wersleydale said: 'An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms.' In Rossiter v. Miller, 5 Ch. D. 648, 659, Lord Justice James said: 'On a question of construction different minds may differ, but, for my own part, I have often felt that in cases

of this nature parties have found themselves entrapped into contracts which they wrote without the slightest idea that they were contracting.' And the same learned judge used similar language in Smith v. Webster, 3 Ch. Div. 56.

"Whether correspondence with the purpose of entering into a contract is merely preliminary negotiation or the contract itself must be determined by the language used and the circumstances known to both parties under which the communications in writing were had. If it is plain from the language used that some term which either party desires to be in the contract is not included or definitively expressed in the correspondence relied upon, no contract is made. If it is plain from the language that either party wishes or contemplates that another person, not a party to the correspondence, shall be a party to the contract, a correspondence as to the terms of such a tripartite agreement between two cannot be a completed contract between the two. It is as essential that all the parties intended shall be bound as it is that all the terms intended should be definitively agreed upon.'

Likewise in Andrews v. Schreiber, 93 Fed. 367, it was observed: "A contract between parties is complete whenever the minds of the contracting parties meet upon a given proposition. When the defendant, on the twenty-fourth day of July, 1897, telegraphed to the plaintiffs, offering his wheat of the quality and grade proposed, at fifty-seven cents, and the plaintiffs answered accepting the proposition, that moment the minds of the parties had met in agreement and the contract of sale was complete. 'The unqualified acceptance by one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance': Taylor v. Merchants' Fire Ins. Co., 9 How. 399, 13 L. ed. 187. 'The rule of law now is that a contract is completed when its acceptance is forwarded, without reference to the time of its reception': Lungstrass v. Insurance Co., 48 Mo. 201, 8 Am. Rep. 100. The same rule applies in this day to correspondence conducted by telegraph. The letter from plaintiffs to defendant of the same date was but a confirmation of their acceptance of the contract, and this letter was presumably received by defendant on July 25th."

In order for telegrams to constitute a contract they must show the essentials of a contract. If they refer to a sale of land they should so describe the land that it can be identified: Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179. They should show substantially the terms and price of the article sold without parol aid: Rector Provision Co. v. Sauer, 69 Miss. 235, 13 South. 623.

Thus a telegram, "Come on at once at salary of $2,000, conditional only upon satisfactory discharge of business," is insufficient as a contract, because it fails to show the kind of employment or its duration: Palmer v. Marquette etc. Co., 32 Mich. 274. Where telegrams relating to ballasting of railroad tracks fail to show the quantity

of work to be done, they raise a fair implication that the amount to be done is to be determined by the railroad and hence that parol evidence is not admissible to show that any specific amount was to be done: Wells v. Milwaukee etc. Ry. Co., 30 Wis. 605. Where an offer to sell a certain quality of cans at a specified price was made by letter and the offer was accepted by telegraph, it was held that the letter, telegram and proof of the receipt of them by the respective parties constituted a parol contract: Trench v. Harding County Canning Co., 168 Ill. 135, 48 N. E. 64. But a telegram by an agent in charge of a summer resort to a friend, stating: "There are many cases of yellow fever at the Well. Send out a physician without fail this evening," is not a contract to pay for the services of the physician: Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88.

b. Necessity for Telegrams to be Free from Ambiguity.—For telegrams to constitute a valid contract between the sender and receiver, they must not be indefinite, uncertain or ambiguous: Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879; Watt v. Wisconsin Cranberry Co., 63 Iowa, 730, 18 N. W. 898; Lincoln v. Erie Preserving Co., 132 Mass. 129; Hazard v. Day, 14 Allen, 487, 92 Am. Dec. 790; Hastings v. Weber, 142 Mass. 232, 56 Am. Rep. 671, 7 N. E. 846; Palmer v. Marquette etc. Co., 32 Mich. 274; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; Alexander v. Western Union Tel. Co., 67 Miss. 386, 7 South. 280; Rector Provision Co. v. Sauer, 69 Wis. 235, 13 South. 623; Whaley v. Hinchman, 22 Mo. App. 483; Marschall v. Eisen Vineyard Co., 7 Misc. Rep. 674, 28 N. Y. Supp. 62; Moulton v. Kershaw, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172.

The court in Watson v. Baker, 71 Tex. 739, 9 S. W. 867, in discussing the sufficiency of letters and telegrams to show a sale of land, said: "As in all other contracts in writing, parol testimony cannot add to their terms, yet it can show the circumstances. It cannot make the contract for the sale of land, but can apply a description to the property, if such application can be made, so that it be known that the particular object is found. Parol evidence cannot add to an imperfect contract a material part in order to sustain it, but it can apply a description in it to the subject."

Abbreviations or symbols used in a business to denote certain articles of merchandise may be used in making sales by telegraph, where they have a well-known meaning in the trade, such as the use of numbers in designating samples of hops, or the use of the word "cribs" to designate clear ribs in the meat trade: Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; Pepper v. Western Union Tel. Co., 87 Tenn. 554, 10 Am. St. Rep. 699, 11 S. W. 783, 4 L. R. A. 660.

Cipher telegrams may be explained by parol evidence showing that the message was intelligible to the party receiving it: Western Union Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. Rep. 950, 37 L. ed. 819. Thus, it is permissible to

show that it was understood by the parties that a telegram reading, "Buy three May," meant "Buy 3,000 bushels of May wheat," the court observing that: "Ciphers play an important part in business affairs, and we see no reason why they are not as proper subjects for translation as foreign languages": Carland v. Western Union Tel. Co., 118 Mich. 369, 74 Am. St. Rep. 394, 76 N. W. 762, 43 L. R. A. 280. But of course it should be shown that the cipher message was intelligible to all the parties concerned in order to constitute the message a contract. Hence, where the message reads: "Sell grained —— star brand, evaporated apples, abstrusely delivered St. Louis next week's shipment from Western New York," it is necessary to show that the receiver of the message understood the word "grained" to mean "one carload" and the word "abstrusely" to mean "ten and three-fourths": J. K. Armsby Co. v. Eckerly, 42 Mo. App. 299.

c. What is a Sufficient Designation of the Parties.—Ordinarily, when the transaction about which the telegrams relate is between the parties using the telegraph, the question whether the parties to the contract are shown does not arise. But where the transaction is one between agents or brokers, the question whether the signers of the telegrams are acting personally or merely as brokers often becomes material.

Thus, where a broker, who had acted as broker for the defendant and had also dealt with defendant in his own name, sent the following telegram: "Telegraph how much corn you will sell, with lowest cash price, Buffalo," defendant replied, "Three thousand cases, one dollar five cents, open one week," to which the broker replied, "Sold corn; will see you to-morrow," the court, after holding that there was no sale to the broker, said: "Construing the first two telegrams together, the defendant says to the plaintiff that it will sell a certain quantity of corn on certain terms, and within a certain time; but it does not say that it will sell to the plaintiff. It says in effect that it will hold the corn for a week, for the plaintiff to find a purchaser. The plaintiff's reply confirms this construction, for he does not say that he will take the corn, but that he has sold it and will see the defendant the next day": Lincoln v. Erie Preserving Co., 132 Mass. 129. And where the following telegraphic correspondence was had, viz.: "Carleton & Moffat, New York. At what price can you supply C. F. L. June, July delivery one million Standard Calcutta wheat bags? Terms, notes payable 1st day of November, 1st day of December; interest to begin 1st day of July. E. L. G. Steele & Company," to which the defendant replied: "E. L. G. Steele & Co., San Francisco: Calcutta offers, subject to immediate reply, one million centals March, April shipment, steamer 3 92/100 cents, net cost, and freight. Must have a confirmed bankers credit on London, four months' sight. Subject to reply by 5 p. m. here to-day Thursday. Carleton & Moffat," to which plaintiff's assignors replied: "Carleton & Moffat, 132 Front Street, New York: We accept, for our

account, one million standard Calcutta bags, size twenty-two by thirty-six, weight twelve ounces, as per your telegram of to-day. Wire us, confirming this, and naming your correspondent in Calcutta, and instruct us regarding credit. E. L. G. Steele & Co.," the court in holding that the firm of Carleton & Moffat were personally bound, said: "It is insisted by the defendant that the fair reading of this telegram was that it was an offer made, not by him, but by somebody else, which he transmitted. As will be seen, the question turns upon the construction of the phrase 'Calcutta offers.' We think it would be straining the language used to assume that such phrase meant that somebody in Calcutta offered to sell. The more reasonable and natural view to take would be that, the plaintiff's assignors having asked the defendant if he would sell, the words 'Calcutta offers' as used by the defendant, mean that 'From advices received from Calcutta we offer you'; and then follow the terms which are different from the offer. This answer is signed, not by the defendant as agent, but in his firm name, and presumably, therefore, in his personal, and not in any representative, capacity. That this is a reasonable construction follows from the fact that the plaintiff's assignors were not asking the defendant what he could obtain from Calcutta, but the inquiry was what 'you' (meaning the defendant personally) would sell the bags for. Before answering the telegram, it might well be that the defendant needed advices from Calcutta as to the terms upon which he could get the bags, which would fully explain the phrase used, 'Calcutta offers.' It will also be noted that in his telegram, the defendant requested an answer by 5 P. M. The only purpose of requesting that answer was to have the contract completed. There was no one suggested to whom the plaintiff's assignors could direct their answer, except to the defendant, and it was entirely immaterial from whom the bags were obtained, provided they were of the proper standard; but as the bags were undoubtedly to come from Calcutta, the price and time of shipment from that place were important. To hold that these telegrams did not make a contract would necessarily assume that the reply which the defendant required was with no intention of binding either himself or anyone else, because there is no suggestion of a dealing between the plaintiff's assignors and any person except the defendant. The latter does not intimate that he was acting in a representative capacity, or for an undisclosed principal, nor do we think any such inference is to be drawn from the fact that in the confirmatory telegram to the defendant, accepting the latter's offer, we find a request for the defendant to name a 'correspondent in Calcutta.' We think it was an erroneous assumption on the part of the judge below to conclude from this that the senders of the telegram considered that they were dealing with the defendant as an agent, and that it was sent with a view of learning the name of the principal. It must be remembered that the defendant required, among other conditions, 'a confirmed banker's credit on London'; and it was necessary for plaintiff's assignors to know who was to receive

this credit, as it was equally proper for them to know the name of the party who was to ship the bags. It would be placing too much importance upon such language to conclude that it was an inquiry for the name of defendant's principal, while the telegrams themselves show that all the essential dealings were immediately with the defendant. The plaintiff's assignors were not concerned with the question of how or from whom, the defendant might obtain the bags; but, having made a contract with him to purchase them, it was, of course, proper that they should have the information, so that they might comply with the terms contained in the defendant's telegram in reference to credit, and the place from which the bags were to be shipped. If, however, the defendant was in fact acting as agent, we think he was still liable for failure to disclose the name of his principal. The general rule is that one who acts as agent for another, in order to release himself from liability should disclose his principal, because otherwise it would be presumed that he intended to bind himself personally. In other words, it is not the duty of one dealing with an agent to find out whether he is acting in the transaction in that capacity or as principal; but it is the duty of the agent, if he desires to relieve himself from personal liability, to disclose the name of his principal in the transaction.

"The conclusion at which we have arrived, therefore, is that there was a direct inquiry to the defendant personally, as to the price at which he would sell the bags; that in reply, the defendant proposed the terms upon which he would sell, and that the final telegram of the plaintiff's assignors was an acceptance of the offer made, and completed the contract": Crossett v. Carleton, 23 App. Div. 366, 48 N. Y. Supp. 309.

The contracting parties may be ascertained by means of a confirmatory telegram. Thus, where the agent of the vendee sent the following telegram: "Horst & Lachmund Co., Santa Rosa, Cal. Bought thirteen at eleven five-eighths net you: confirm purchase by wire to Brewer, nineteen sixteen M. Street, inspection on or before Saturday. Do you want fifteen at eleven quarter? C. A. Wagner," who responded with the following telegram to the vendor: "Geo. Brewer, 1916 M. Street, Sacramento, Cal. We confirm purchase Wagner eleven five-eighths cents, like sample. Horst and Lachmund Co.," it was held that the telegrams considered in the light of the circumstances sufficiently disclosed the parties to the transaction: Brewer v. Horst & Lachmund, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. And in an Iowa case it was held that the statement in a telegram that a sale had been made to Watt did not of itself show that the sale was made to Watt, Cochran & Sperry: Watt v. Wisconsin Cranberry Co., 63 Iowa, 730, 18 N. W. 898.

d. Effect of Mistake of Telegraph Company in Transmission on the Contract.—The effect of a mistake on the part of the telegraph company in the transmission of telegrams respecting the quantity or price of goods sold by telegraphic correspondence has arisen most frequently

in suits against the telegraph company for the recovery of the damages suffered by the parties. The question whether the incorrect message forms the basis of the contract between the sender and receiver of the message is, in such cases, frequently obscured by the question whether the plaintiff has a right to sue the telegraph company for breach of contract or in tort. The principle, however, upon which those cases are decided, and the general rule respecting the question which message is the original one for the purpose of evidence in cases concerning contracts by telegraph, undoubtedly presupposes that the message as delivered by the telegraph company is the basis for the contract save where the telegraph company is, under the circumstances of the case, the agent of the receiver for the purpose of receiving an answer to a previous message sent by such receiver.

Thus in Haubelt Bros. v. Rea etc. Mill Co., 77 Mo. App. 672, which was a case in which the telegraph company made a mistake in a telegram quoting the price of flour, the court said: "The defendant contends that there was no meeting of the minds of the contracting parties, and therefore no contract. To this contention we cannot give our assent. The meeting of minds which is essential to the formation of a contract is not determined by the secret intention of the parties, but by their expressed intention, the latter of which may be wholly at variance with the former: Brewington v. Mesker, 51 Mo. App. 348; Esterly H. M. Co. v. Criswell, 58 Mo. App. 471. The defendants' agent, Gardner, telegraphed for prices on certain brands of flour which the defendant also by telegraph promptly gave him. These prices were quoted to plaintiffs, who thereupon entered into the contract for the sale and delivery shown by the memorandum. The contract was entered into between the defendant acting through its agent, Gardner, on the one side and the plaintiff on the other. No essential necessary to the formation of the contract was wanting." And continuing the court observed: "Had it not been for the negligence of the telegraph company in failing to correctly transmit the defendants' message as to prices, this controversy would never have arisen. The question now is, Who shall suffer for the negligence of the telegraph company: the defendant who was in privity with it or the plaintiffs who sustained no such relation? The rule is that where one makes an offer by telegraph, he thereby makes the telegraph company his agent for its transmission, and if it is altered in the transmission, he is bound by it as transmitted: Bishop on Contracts, art. 328. So far as the plaintiffs were concerned, the quotations which Gardner received and requoted to the plaintiffs are to be taken as if there had been no error in the transmission of the same. These quotations must be regarded as those of the defendant, and when the plaintiffs agreed to purchase of the former's agent at the prices so quoted, as evidenced by the memorandum thereof reduced to writing, this was in legal effect a complete meeting of minds. The error in the transmission becomes unimportant."

And in a much cited case from Georgia, in which plaintiff sued the telegraph company to recover damages sustained by selling turpentine at the price stated in the telegraphic offer, which was erroneously transmitted by the telegraph company, the court, in adverting to the argument that the plaintiff was not obliged to sell according to the prices erroneously stated in the telegram, said: "Whether the telegraphic operator be the agent of the sender of a dispatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not, and the American doctrine mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer actually made, though by mistake of the agency he used to convey it, and when he does so settle in good faith, and is induced to do so by the negligence of the telegraphic company, through its servants, that company should respond to him in damages, whether absolutely bound by his contract or not, and that the measure of his recovery from the company should be as stated above.

"The English authorities seem to rest on the connection of the telegraphic lines there with the postoffice, and to go on the principle that the government is not responsible for the negligence of a clerk: See note to Verdin Brothers v. Robertson, Allen's Tel. Cas. 697-699, and Henkel v. Pope, Allen's Tel. Cas. 456, 457, note. And as in this country the company is a private corporation, acting as a bailee or agent or carrier, to transmit offers to sell and answers to buy, it would seem that both sides of the water may be held not to collide in their judgment on the law": Western Union Tel. Co. v. Shotter, 71 Ga. 760.

The right to recover from the telegraph company for its mistake in transmitting the message is sometimes based on the violation of a duty, the faithful discharge of which the company has undertaken, rather than on a violation of contract: Rose v. United States Tel. Co., 3 Abb. Pr., N. S., 408.

The proposition that the telegraph company is the agent of the sender of the message for the purpose of its transmission was vigorously repudiated in Pepper v. Western Union Tel. Co., 87 Tenn. 544, 10 Am. St. Rep. 699, 11 S. W. 783, 4 L. R. A. 660, the court likening the position of the telegraph company toward its employer to that of an independent contractor.

And in a Mississippi case the court, after an exhaustive discussion as to the agency of the telegraph company with respect to the transmission of the message, held that the telegraph company is liable to the sender for an erroneous transmission in contract or tort, but only liable to the receiver in tort: Shingleur v. Western Union Tel. Co., 72 Miss. 1030, 48 Am. St. Rep. 604, 18 South. 425, 30 L. R. A. 444. A mistake in the transmission of a telegram may, however, be ratified

by accepting part payment of the prices quoted, with knowledge of the mistake: Culver v. Warren, 36 Kan. 391, 13 Pac. 577. In this general connection see, also, subdivision II.

e. Right to Consider Letters or Other Writings in Connection with Telegrams.—Where the whole agreement can be collected from various papers, such as letters or telegrams, referring to one another or directly related to one another, so that they may be fairly said to constitute one paper, the letters and telegrams will be deemed to constitute the contract: Bissenger v. Prince, 117 Ala. 480, 23 South. 67; Calhoun v. Atchison, 4 Bush, 265, 96 Am. Dec. 299; Olds v. East Tennessee etc. Co. (Tenn. Ch.), 48 S. W. 333; Cobb v. Glenn etc. Co., 57 W. Va. 49, ante, p. 734, 49 S. E. 1005; Utley v. Donaldson, 94 U. S. 29, 24 L. ed. 54; Alford v. Wilson, 20 Fed. 96. But the telegrams and letters must be connected without the aid of parol: Duff v. Hopkins, 33 Fed. 599.

In construing letters and telegraphic replies thereto into contracts, care should be taken not to construe as a contract letters which were intended only as preliminary negotiations or mere business circulars or letters of a general nature soliciting trade.

But a person may, of course, bind himself by an offer to sell personal property where the amount or quantity is left to be fixed by the person to whom the offer is made: Moulton v. Kershaw, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172.

Thus where the plaintiff wrote to a wholesale dealer in pork, inquiring: "Have you any more northwestern mess pork or prime mess, also extra mess? Telegraph price on receipt of this"; to which the dealer replied by telegraph: "Letter received. No light mess here. Extra mess twenty-eight seventy-five (28.75)," whereupon plaintiff sent a telegram reading, "Dispatch received. Will take two hundred extra mess, price named"—the court held that the telegram stating the price of pork was a mere quotation of the market price of pork and the reply telegram to it was a mere order for goods which the dealer might accept or reject at his pleasure and which until accepted constituted no contract: Beaupré v. Pacific etc. Tel. Co., 21 Minn. 155. But in Eckert v. Schoch, 155 Pa. St. 530, 26 Atl. 654, the following correspondence by letters and telegrams was held to constitute a contract, viz.: The plaintiff wrote a letter to defendant inquiring whether he had any wheat to sell; the defendant responded with a postal card asking, "What can you pay for good Pa. wheat on track here? If you can pay 83½ on track here for prime Pa. wheat, will send you sample. Please let me hear by return mail." Plaintiff replied by telegram stating, "If good stock, think can place five cars, price named. Send sample quick," and on the same day also wrote to defendant, "On receipt of your postal I wired you that 'If good stock, I thought I could use five cars of wheat at price quoted (83½). Send sample quick.' Demand for wheat is good, and I think I can do some trading with you. The freight rate, I suppose, is about thirteen cents," which was followed by a telegram on the same day stating,

"Ship quick five cars of prime red wheat to Stemton, as trial lot." This telegram was followed the next day by a letter stating, "I confirm purchase of five cars prime Penn'a wheat at 83½, track, Silinsgrove. Bill all to Stemton, and get as low a rate as possible. Get them off at once. This is to be a sample lot, and if satisfactory I hope to handle considerable of your wheat. Send me an average sample at once."

f. **Effect Where Telegram is Used in Conection With Prior Oral Negotiations.**—Where previous oral negotiations were had between the parties in respect to the subject matter of a contract and a telegram is sent to fix some details of the agreement, the telegram is merely evidence to the point shown by it and does not constitute the contract: Beach v. Raritan etc. R. Co., 37 N. Y. 457. Thus where the original negotiations were oral, a telegram stating: "I will take double deck car hogs. Wm. C. Bryant will close contract," was insufficient to constitute a contract, the court saying: "Standing by itself, the telegram contained none of the elements of a bargain except quantity, and it implied that there had been some communication previously in regard to terms, which would have to be appealed to, to explain the substance of the bargain. Moreover, it did not purport to be a note or memorandum of an agreement at all, but only a simple notification of adhesion to an agreement which had been provisionally arranged theretofore, and the terms of which were assumed to be understood, and the facts show that the previous arrangement so referred to was one which rested wholly in parol": McElroy v. Buck, 35 Mich. 434.

g. **Effect Where Telegrams Contemplate Reduction of the Contract to a Formal Writing.**—If the correspondence and telegrams between the parties contain all the details of a contract, it is enforceable even though the telegrams show that their agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what already has been agreed upon: Nash v. Kreling (Cal.), 56 Pac. 262; Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 43 Am. St. Rep. 757, 39 N. E. 75, 29 L. R. A. 431; Phenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453.

V. Necessity for Offer or Proposition Made by Letter or Telegram to be Accepted.

a. **Necessity for Acceptance to be Clear, Definite and Unconditional.** There must be a distinct offer in order to form a basis for an acceptance in regard to telegraphic correspondence in the same manner as is necessary respecting correspondence by letter, since it is essential that there be a meeting of the minds of the parties upon all the terms of the contract: Deshon v. Fosdick, 1 Woods, 286, Fed. Cas. No. 3819. A mere request by telegraph for an extension of time within which to perform certain conditions of a contract, which is not accepted by the party to whom the telegram is addressed, does not

modify the original contract: Goulding v. Hammond, 54 Fed. 639, 4 C. C. A. 533. Likewise a mere letter of advice calling the attention of the addressee to the advisability of buying certain real estate is not such an offer, the acceptance of which will amount to a contract of sale: Alexander v. Western Union Tel. Co., 67 Miss. 386, 7 South. 280.

The telegraphic acceptance of a proposition must be substantially absolute, but that does not preclude the leaving of minor details of the transaction for future settlement: Western Union Tel. Co. v. Valentine, 18 Ill. App. 57. An offer is not accepted by a telegram which accepts a proposition with a qualification attached to the acceptance, such as where defendant's son, who had no authority to sell the land, sold it subject to the approval of the owner, and then telegraphed to defendant: "Have sold the Rastel place for twenty-five. Answer," to which defendant responded: "Sell land, reserving crops": Clay v. Ricketts, 66 Iowa, 362, 23 N. W. 755; and likewise where the acceptance of an offer to sell land proposes that the deed be sent to the place where the buyer lives to be delivered upon payment of the price of the land, the proposal not being made as a mere suggestion, the acceptance is not sufficient to bind the parties: Baker v. Holt, 56 Wis. 100, 14 N. W. 8; and where there was considerable correspondence, both by letter and telegraph, concerning a sale of corporation stock, an acceptance of an offer to sell the stock at a fixed price, which stated: "I accept offer thirty-three for all your stock draw three days' sight draft with stock attached. Answer promptly number of shares," is not an absolute acceptance, but one with a condition attached to it respecting the mode of payment: Cameron v. Wright, 21 App. Div. 395, 47 N. Y. Supp. 571. And where, in response to a telegram asking prices on corn, the telegraphic reply quoted the price for two grades of corn, a telegraphic answer ordering five cars of corn, but without stating the grade, is insufficient to constitute a contract: Seley v. Williams, 20 Tex. Civ. App. 405, 50 S. W. 399.

The acceptance must be clear and definite. Hence, where after several exchanges of telegrams in regard to the purchase of forty thousand tons of coal, a final telegram, after receipt of a telegram giving prices and time of delivery, which stated: "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week," is not sufficiently clear and definite to constitute a sale of the coal: Martin v. Northwestern Fuel Co., 22 Fed. 596. A similar conclusion was had respecting a correspondence and telegrams concerning a proposed building contract in a case where the phrase, "You may consider that you have the contract," was used in a letter responding to a telegraphic inquiry: Bissinger v. Prince, 117 Ala. 480, 23 South. 67. But where in response to a telegram asking, "Will you extend note for thirty days? Answer at once," a bank replies by telegram, "Would prefer money, if you can raise it conveniently," the reply amounts to an offer to renew

the note if the money cannot be raised conveniently: Shobe v. Luff, 66 Ill. App. 414.

b. Necessity for Acceptance to be Prompt.—From the very fact that the correspondence in regard to a transaction is done by telegraph, it follows that delays in the acceptance of a proposition are not permissible. The acceptance of a telegraphic offer must be made in accordance with the conditions stated in the offer if conditions are stated.

Where negotiations are conducted by telegraph with respect to articles which fluctuate much in price, an acceptance must be immediate and as soon after the receipt of the offer as would give an opportunity for consideration: Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431, Fed. Cas. No. 9635. Hence, where coal dealers wrote to prospective customers offering to sell coal at a certain price, but requested them in case they desired to purchase to "Kindly wire us at our expense on receipt of this," a reply two days later by letter ordering a quantity at the price named is too late: Horne v. Niver, 168 Mass. 4, 46 N. E. 393. And where a telegram making an offer to sell fruit cans, after stating the price, added, "Wire instantly or this is withdrawn," was delivered about 10 P. M., an acceptance delayed until Monday morning is so unreasonable as not to constitute a contract: James v. Marion Fruit etc. Co., 69 Mo. App. 207. Likewise, where a proposal by letter states: "This is for a wired acceptance on receiving this letter, or no trade," an acceptance wired the following day is insufficient: Eagle Mill Co. v. Caven, 76 Mo. App. 458. Where, through telegraphic correspondence, an offer to sell goods is answered with an offer to buy at a certain price with the condition added, "Must have reply early to-morrow," such condition is a stipulation for a reply within that time, and when it is not received until late in the evening of that day and in the absence of proof that the condition was complied with, the contract is not complete, and the title will not pass as against an attachment levied on that day before the reply was received: Union Nat. Bank v. Miller, 106 N. C. 347, 19 Am. St. Rep. 538, 11 S. E. 321. And where a person inquired by letter, "What is Cole's scrip worth and soldiers' additional homesteads now?" to which the addressee responded by letter: "I can furnish to-day Cole's scrip at $5 and additional eighties at $3 per acre," a telegram the next day after the receipt of the reply, stating "Send me two soldiers' additional eighties (80's) to-day," is too late to constitute an acceptance in accordance with the prior correspondence: Talbot v. Pettigrew, 3 Dak. 141, 13 N. W. 576.

c. What Constitutes a Telegraphic Acceptance of a Check, Draft or Other Commercial Paper.—A promise to indorse a note may be made by telegram: Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355. Where a letter to a broker inquiring the price of cotton, stated, "If we can see a margin will authorize you to draw for the cost," a telegram, on being informed of the price, stating, "Will advance cost if you buy

strict, good, ordinary at sixteen," is an unconditional promise in writing to accept a bill before it is drawn: Whilden v. Merchants' etc. Bank, 64 Ala. 1, 38 Am. Rep. 1. And where in response to a telegram asking, "Will you honor draft drawn by A. Harper for $2,300?" a reply telegram is sent stating, "Will pay A. Harper draft $2,300 for stock," is not a conditional acceptance, but an absolute undertaking to accept and pay the draft, the words "for stock" being regarded as surplusage: Coffman v. Campbell, 87 Ill. 98. Likewise where in response to a telegram to a bank, asking it, "Will you pay James Tate's check on you, twenty thousand dollars? Answer," the bank answers, "James Tate is good. Send on your paper," the telegram of the bank is a contract to pay the check on presentation: North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145. But a telegram stating, "We will pay Clark & Goldsby's draft, $608.92," is not a contract to accept a draft for $680.92: Brinkman v. Hunter, 73 Mo. 172, 39 Am. Rep. 492. And where in response to telegram asking, "Will drafts for thirty-eight hundred, made by J. R. Snyder on you, be paid if presented Monday?" the bank replies, "Drafts named are good now," the reply does not constitute an acceptance, and hence the bank may charge demand notes payable to itself against the account of the drawer before the drafts are presented, even though the holder of the drafts has telegraphed it, "We have sent a man with drafts. Will be there before three o'clock": Myers v. Union Nat. Bank, 27 Ill. App. 254.

VI. Right to Withdraw Telegraphic or Other Offer Before Receipt of Acceptance.

If an offer made by one telegram is accepted by another, it cannot afterward be withdrawn by a third telegram forwarded before the second was actually received but which was not received by the addressee, who was the person accepting the offer, until after his accepting telegram had come into the hands of the person thus seeking to withdraw his offer: Brauer v. Shaw, 168 Mass. 198, 60 Am. St. Rep. 387, 46 N. E. 617. But an offer may, of course, be withdrawn, if withdrawn before a proper acceptance is made: Baker v. Holt, 56 Wis. 100, 14 N. W. 8. Thus, where defendant wrote to plaintiff that she desired to sell certain stock and that she would give him the first right to purchase twenty shares at $800 each, and plaintiff replied, "If you have a bona fide offer of $800 for the whole twenty shares, I will pay you the same, provided you send me the names of those who will pay you this amount, so that I may be able to resell without loss if I wish," and inclosed his check for $100, but after he had deposited his letter for mailing he received a telegram from defendant, saying: "I wish to reconsider the letter I wrote you for the present," the court decided that the defendant had the right to withdraw the offer by her telegram, since the letter of the plaintiff, which had been deposited for mailing, did not complete the contract because she may not have desired to give the names

of the other prospective buyers: Harris v. Scott, 67 N. H. 437, 32 Atl. 770.

VII. Right of Agent to Make Contract Based on Telegraphic Advices from His Principal.

In Keller v. Meyer, 74 Mo. App. 318, a wholesale dealer in flour telegraphed his broker to sell certain brands of flour at certain prices, which were much lower than the market price, the quotations were the result of a mistake on the part of the dealer, and he sought by a later telegram to correct the quotations, but in the meantime his broker sold a large quantity to a local dealer. The local dealer inquired of the broker whether there was not some mistake in regard to the prices, but he assured him that there was not, and showed the telegram in corroboration, and stated that a short time previously his principal had sold flour at a considerable sum below that of other houses. The court held that in view of the circumstances that the local dealer acted in good faith and was justified in purchasing the flour from the broker on the faith of the telegram.

So, also, in Hasbrouck v. Western Union Tel. Co., 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034, in a suit for damages against the telegraph company for damages resulting from its erroneous transmission of a telegram to an agent instructing him with respect to a financial settlement, it was held that the agent was justified in making the settlement upon the authority of the telegram as delivered to him by the company.

And in a Missouri case where the agent telegraphed, "Offered $1,300 cash, lot two, houses near planing-mill. Must hear immediately. Can't get more," but in the telegram as transmitted the amount was changed to nineteen hundred dollars, and the owner on the faith of the telegram as received by him, replied: "Sell property for amount offered. Will send deed Monday 27," the court, in a suit against the telegraph company held that the agent had not only apparent, but actual, authority to close the transaction and that the vendor was bound by the contract entered into by his agent pursuant to his telegraphic instructions: Reed v. Western Union Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, 34 L. R. A. 492.

VIII. Under What Circumstances the Contract is Complete.

In Phenix Ins. Co. v. Schultz, 80 Fed. 337, 25 C. C. A. 453, it was said: "Where a contract is sought to be established by letters or telegrams, it must appear from the direct terms of the same that both sides have agreed to one and the same set of propositions. If any new matter is introduced into the answer, or anything is left by the offer to further determination, no contract has been entered into. If the reply does not in every particular comply with the offer, it will not make a contract: 1 Chitty on Contracts, 11th Am. ed., 15; 1 Parsons on Contracts, 6th ed., 476; Edichal Bullion Co. v. Columbia Gold Min. Co., 87 Va. 641, 13 S. E. 100; Minneapolis etc. Ry. Co. v. Columbus Rolling-Mill Co., 119 U. S. 149, 7 Sup. Ct. Rep. 168, 30 L. ed.

376; Virginia Hot Springs Co. v. Harrison, 93 Va. 569, 25 S. E. 888; Goulding v. Hammond, 54 Fed. 639, 4 C. C. A. 533."

But, of course, where it is intended by the parties negotiating that the telegram which should close the transaction should not merely be deposited for transmission but that it should be actually delivered by the telegraph company, an actual delivery of the telegram is essential: Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634; Lewis v. Browning, 130 Mass. 173.

IX. Sufficiency of Telegrams to Constitute a Contract Within the Statute of Frauds.

a. In General.—Telegrams or letters and telegrams, if so connected as to form one paper, may constitute a contract within the statute of frauds under the same rules which apply to other writings: Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9; Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240; Little v. Dougherty, 11 Colo. 103, 17 Pac. 292; Crystal Palace F. Co. v. Butterfield, 15 Colo. App. 246, 61 Pac. 479; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Welsh v. Brainerd, 95 Minn. 234, 103 N. W. 1031; Greely-Burham Grocery Co. v. Capen, 23 Mo. App. 301; Haubelt Bros. v. Rea etc. Mill Co., 77 Mo. App. 672; Peycke v. Ahrens, 98 Mo. App. 456, 72 S. W. 151; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Watson v. Baker, 71 Tex. 739, 9 S. W. 867; Underwood v. Stack, 15 Wash. 497, 46 Pac. 1031; Kleinhaus v. Jones, 68 Fed. 742, 15 C. C. A. 644; Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. Rep. 913, 34 L. ed. 447.

But a telegram ordering a consignment of assorted goods to be selected out of a list of over a hundred articles with the quantity of each to be designated, and promising to send specifications later, together with a letter accepting the order, is not a sufficient memorandum under the statute of frauds until the specifications are furnished: Wm. Fait Co. v. Anderson (Ark.), 88 S. W. 905; and a letter in the nature of a circular soliciting trade, in which the writers state, "We are authorized to offer Michigan fine salt," etc., and volunteering an opinion that at the terms stated it is a bargain, taken in connection with a telegram stating: "Your letter of yesterday received and noted. You may ship me 2,000 barrels. Answer," is not a sufficient contract under the statute of frauds since the offer to sell does not show that the writers were making an offer to sell in quantities to be fixed by the prospective buyers: Moulton v. Kershaw, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172. Likewise, a telegram, "Mendel, five bellies, eight, Erhlich offers ⅞ths, 10 bellies lighter than last," and a memorandum in the entry-book of the agent of the vendors stating, "Sold account C. H. North & Co. Mendel 5 bellies, 8," are not a sufficient memorandum under the statute of frauds: North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879. Neither is a telegram stating, "I will take double deck car hogs. Wm. C. Bryant will close contract," which merely refers to previous parol negotiations, a sufficient memo-

randum under the statute of frauds: McElroy v. Buck, 35 Mich. 434. Nor is a telegram by a broker inquiring: "Telegraph how much corn you will sell with cash price Buffalo," with answering telegram stating: "3,000 cases, $1.05, open one week," and reply telegram merely stating, "Sold corn. Will see you to-morrow," a sufficient offer to sell under the statute of frauds: Lincoln v. Erie Preserving Co., 132 Mass. 129.

b. What Amounts to a Sufficient Subscription.—A telegram signed by the party to be charged, or his agent, is a memorandum in writing within the statute of frauds: Watson v. Baker, 71 Tex. 739, 9 S. W. 867. A telegram accepting an offer by telegram to sell, together with a letter of the same date signed by the same party and to the same effect, affords sufficient evidence of subscription by the party to take the case out of the statute of frauds: Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511.

c. Right to Aid Telegraphic Contract by Parol Evidence.—In deciding whether several telegrams constitute a contract within the statute of frauds, it was said in Brewer v. Horst & Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240, that: "The court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all circumstances under which it was made, and if, when the court is put into possession of all knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used; and their meaning may be explained as it was understood between the parties: Mann v. Higgins, 83 Cal. 66, 23 Pac. 206; Berry v. Kolwalsky, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202; Callahan v. Stanley, 57 Cal. 476. Also: 'Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter, and to explain all terms and phrases used in a local or special sense': Preble v. Abrahams, 88 Cal. 245; 22 Am. St. Rep. 301, 26 Pac. 99; Towle v. Carmelo etc. Co., 99 Cal. 397, 33 Pac. 1126."

d. Transactions Respecting Land.—An agreement for the purchase of land may be made by telegrams or letters and telegrams if they are so connected by reference, express or implied, showing on their face the essentials of a contract relating to land: Welsh v. Brainerd, 95 Minn. 234, 103 N. W. 1031; Watson v. Baker, 71 Tex. 746, 9 S. W. 867; Underwood v. Stack, 15 Wash. 497, 46 Pac. 1031. But a telegram signed by the vendee is insufficient as a memorandum under the statute of frauds where it does not describe, mention or refer to the subject matter of the contract otherwise than by showing the terms

of payment and directing the agents of the vendor to draw up a contract accordingly: Hazard v. Day, 14 Allen, 487, 92 Am. Dec. 790. And where a telegram asking, "Will you take $400 and let them take it or will you take it at $13,400?" was sent to one who had a parol contract to purchase the premises at $13,000, and who replied by telegraph: "I will take $400 and let them have the farm," it was held that he could not recover the four hundred dollars mentioned in the telegrams where the other parties did not take the premises: Miller v. Nugent, 12 Ind. App. 348, 40 N. E. 282.

The telegraphic correspondence must, however, fully complete the transaction. Thus, in Robinson v. Weller, 81 Ga. 704, 8 S. E. 447, it was said: "It is true that a contract can be made by correspondence through the mail, or by telegrams, as well as when the parties are together, and the same rules will apply in either case. But, in order to make any sort of contract, the offer of the seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort. There must be a mutual consent of the parties thereto, and they must assent to the same thing in the same sense. An absolute acceptance of a proposal, coupled with a condition, will not be a complete contract, because there does not exist the requisite mutual assent to the same thing, in the same sense. Both parties must assent to the same thing, in order to make a binding contract between them. Applying these principles to the facts of this case, we find (1) an advertisement in the newspaper by Mrs. Weller of a certain house and lot for sale; (2) a postal card, addressed to Mrs. Weller by the plaintiff, inquiring as to her price and terms; (3) a letter from Mrs. Weller, the defendant, stating her price and terms; (4) a telegram from the plaintiff to the defendant saying, 'Offer accepted. Money ready; send deeds at once'; and a letter of the same date, amplifying the telegram, and stating the same thing in substance, as will be seen by reading the above correspondence. It will be observed from this correspondence that Robinson, the plaintiff, resided in Rome, Georgia, and Mrs. Weller, the defendant, in Chattanooga, Tennessee. When, therefore, she wrote to Robinson that she would accept two thousand dollars for the property, one-third cash and the balance on time, her offer meant that she would accept the cash at her place of residence in Chattanooga, and that she would make the deeds to the purchaser in Chattanooga. That was the legal intent and meaning of her offer. She was not compelled to make the deeds, and send them to Rome, Georgia, nor go to Rome, Georgia, for the cash payment; and when Robinson wrote acepting her offer, and saying that the money was ready at Rome, and directed her to send the deeds to Rome, it was not a full acceptance of the offer which she had made, and therefore was not a complete contract, and the court did not err in nonsuiting the plaintiff."

The description of the property must be sufficiently definite to admit of its identification. Thus a telegraphic offer stating: "I will give you $2,000 for your lot, if accepted to-night," to which the ad-

dressee responded: "Will accept your offer," is too indefinite to admit of parol evidence to identify the lot in a suit for specific performance: Farthing v. Rochelle, 131 N. C. 563, 43 S. E. 1.

"The writing itself should afford the means whereby the identification may be made complete by parol evidence." Consequently, the telegram, "I will take your house at $3,000. Answer," with the reply, "See J. B. Williams; if not sold you can have it," is an insufficient description to comply with the statute of frauds: Whaley v. Hinchman, 22 Mo. App. 483. And where the agent of the owner telegraphed him, "I am offered seventy thousand for balance of Merced town property—five thousand on Tuesday next; balance in thirty days. This is according to your proposition. Telegraph me at Fresno your answer," to which he replied: "Accept the seventy thousand dollars offered for Merced property," whereupon the agent telegraphed to the purchaser: "Mr. Crocker has telegraphed me as follows: Accept the seventy thousand dollars offered for the Merced town property," the court decided that the telegrams were an insufficient memorandum because it could not be ascertained from them who the buyer was nor what property was the subject matter: Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179. It may, however, be observed that the decision was dissented from by Chief Justice Beatty and Justice Thornton.

With respect to leases, it was held in Hastings v. Weber, 142 Mass. 232, 56 Am. Rep. 671, 7 N. E. 846, that where an agent sent a description of a store and the rental asked for five years, to his principal, who telegraphed him: "If basement included at $4,000, secure 5 years' lease," the oral acceptance by the landlord of the terms on being handed the telegram by the agent was an insufficient memorandum under the statute of frauds, since it disclosed only instructions to the agent and not authority to make a contract.

But it has been also held that a telegram signed by the tenant and sent to his agent in response to an offer in a letter by the agent, stating the terms upon which the landlord would make a lease, to which the telegram refers, is a sufficient memorandum under the statute of frauds: Gaines v. McAdam, 79 Ill. App. 201; Kingsley v. Siebrecht, 92 Me. 23, 69 Am. St. Rep. 486, 42 Atl. 249.

Where all the conditions and stipulations for a lease are embodied in letters and telegrams, it is a sufficient memorandum, notwithstanding that it was contemplated that a formal lease was to be thereafter drawn: Post v. Davis, 7 Kan. App. 217, 52 Pac. 903.

X. Law Which Governs Telegraphic Contracts.

The same difficulty respecting the conflict of laws which occurs with respect to other contracts also occurs with respect to telegraphic contracts. Thus, it has been declared in Illinois that where a message from another state is to be delivered in Illinois, the law of the place of delivery governs: North Packing etc. Co. v. Western Union Tel. Co., 70 Ill. App. 275. And it has also been stated that where the offer

is made in one state and accepted by telegraph in another, the contract is completed in the latter state by the sending of the telegram, notwithstanding it is to be performed in the former state: Perry v. Mt. Hope Iron Co., 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632. And then, again, it is said that the validity of contracts is to be determined by the law of the forum, in the absence of allegations and proof of what the lex loci contractus is: Gist v. Western Union Tel. Co., 45 S. C. 344, 55 Am. St. Rep. 763, 23 S. E. 143. And it is also asserted that the law of the place where the contract is to be performed governs subject to the rule that a contract void by the law of the place where made is void everywhere: Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068, 36 L. R. A. 711. Thus, where a person in Colorado telegraphs to a bank in Missouri asking if it will accept a check of a certain person for a specified amount, to which the bank replies that it will, the contract of acceptance is a Missouri contract: Garrettson v. North Atchison Bank, 47 Fed. 867. In this connection see, also, the monographic note to Gist v. Western Union Tel. Co., 55 Am. St. Rep. 778, as to whether a contract is void everywhere if void where made.

XI. Admissibility of Telegrams in Evidence.

a. General Rule as to Admissibility.—Telegrams are, of course, admissible in evidence in the same manner as are other writings: Hammond v. Beeson, 112 Mo. 190, 20 S. W. 474. But where telegrams are relied upon to establish contracts, they must be proved in the same manner as other writings: Durkee v. Vermont Central R. Co., 29 Vt. 127. In proving a contract by telegrams, the best evidence is the telegram containing the offer as received at the point of destination and the telegram containing the acceptance as delivered for transmission: Cobb v. Glenn Boom etc. Co., 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005. Where telegrams do not constitute the whole contract, the other parts of it may be proved by parol or by other writings, or both, as in other cases where the whole contract has not been reduced to writing: Meinhardt v. Mode, 22 Fla. 279.

Telegrams sent by a third party are admissible where they were in fact approved and their transmission authorized by the person against whom they are offered: Farnsworth v. Nevada Co., 102 Fed. 578, 42 C. C. A. 509.

But a defective memorandum of sale cannot be aided by a telegram from a party not connected with the transaction: J. K. Armsby Co. v. Eckerly, 42 Mo. App. 299.

A telegram from the plaintiff to the defendant confirming a contract made on the same day is admissible in an action for the breach of the contract where the existence of the contract is disputed: Rogers v. Fenimore (Del.), 41 Atl. 886. In an action by a brakeman for injuries a telegram containing instructions may be shown in evidence where it is shown that the sender of the telegram was a train dispatcher: Southern Ry. Co. v. Howell, 135 Ala. 639, 34 South.

6. And in an action for malicious prosecution, telegrams between the parties and from the defendant to third persons, relative to the transaction, are admissible as part of the res gestae: Chrisman v. Carney, 33 Ark. 316. A copy of a forged telegram and the record of its receipt at the telegraph office, the original being lost, are admissible in an action on a promissory note, induced by such telegram, to show privity of the holder with the sending of the telegram: Rees v. Jackson, 64 Pa. St. 486, 3 Am. Rep. 608.

The delivery of a telegram to a person on a certain day at a distant place is not proved by a reply received very soon afterward: Howley v. Whipple, 48 N. H. 487.

b. Preliminary Requisites to Admissibility.

1. Necessity to Show Authenticity of the Telegram.

A. In General.—In the principal case it was stated that whether a copy is introduced or the original telegram is used, it is necessary that its genuineness be shown before it is admissible. And where telegrams are sought to constitute a contract between the parties, if they are written and sent by some person other than the one who is sought to be charged, it is necessary that the authority of the person writing and sending them be shown. Hence, where the secretary of a corporation has no authority by virtue of his office to make a contract relating to the sale of land, the corporation cannot be held liable by reason of his letters and telegrams unless he had at the time express authority from the corporation to make the sale or unless he was held out by the corporation in such a way as to make it apparent that he had such authority, or unless the contract was ratified by the defendant: Cobb v. Glenn Boom etc. Co., 57 W. Va. 49, ante, p. 734, 49 S. E. 1005.

Hence, the general rule is that a telegram is not admissible as a communication of the party whose name is subscribed to it, without proof of its authenticity: Richie v. Bass, 15 La. Ann. 668; Burt v. Winona etc. Ry. Co., 31 Minn. 472, 18 N. W. 285, 289; Yeiser v. Cathers (Neb.), 97 N. W. 840; Reynolds v. Hinrichs, 16 S. Dak. 602, 94 N. W. 694; Drexel v. True, 74 Fed. 12, 20 C. C. A. 265. It is not necessary to show that the party whose name is signed to the telegram in fact signed it and procured its transmission: Lewis v. Havens, 40 Conn. 363. The authenticity may be proved by proof of the handwriting where the original telegram is used: Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355. In other cases, it is sufficient if it be shown that the telegram is in the handwriting of the person in charge of the telegraph office at which it was received, though its authenticity may be also shown in other ways: Richie v. Bass, 15 La. Ann. 668. The original must, however have been authorized or sent by the alleged sender or by his direction, but it is not necessary to prove that some person saw the sender send the message. Circumstantial evidence is, of course, sufficient: Adams v. Mille Lacs Lumber Co., 32 Minn. 216, 19 N. W. 735; Flint v. Kennedy, 33 Fed. 820.

A telegram from the wife of one defendant in an action for conspiracy, not written nor sent to either defendant, is not admissible as evidence against them: Benford v. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545. But a telegram addressed to J. W. Fenimore & Co. and delivered to J. W. Fenimore, Jr., is admissible in evidence against the latter on a showing that there was no firm of the first name in the city: Rogers v. Fenimore (Del.), 41 Atl. 886.

B. Authenticity of Reply Telegrams.—The modern rule respecting the presumptive authenticity of reply telegrams was stated in Western Twine Co. v. Wright, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438, in which the court said: "When the message addressed to appellant was deposited in the office with the operator at Sioux Falls, all charges for transmission being prepaid, every inference that follows the posting of a letter with similar correctness, to be sent by United States mail, attached, and in the absence of anything to the contrary, the presumption is that the same reached its destination, and was delivered in accordance with the obligation which the law imposes upon telegraph companies: Perry v. German-American Bank, 53 Neb. 89, 68 Am. St. Rep. 593, 73 N. W. 538; Commonwealth v. Jeffries, 7 Allen, 548, 83 Am. Dec. 712; 2 Wharton on Evidence, par. 1323; Croswell on Electricity, par. 674. In Oregon S. S. Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485, the court say: 'There is impressed upon the telegraph service something of a public character, and thrown around it the guard and the obligations of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph.' As a rule, to which an exception is rare, all letters and all telegrams, with equal certainty, reach their destination, and, the reasonable intendments with reference to each being identical, the same legal presumptions may well be entertained as to both. If the telegram which purports to come from appellant be considered as a copy, the original of which has been destroyed, its admission was authorized, under the elementary principle that, after the proper foundation has been laid, resort may be had always to secondary evidence as the best within the power of the party to produce. Unquestioned as it is, the presumption that the first message was transmitted to, and received by, appellant stands as ample proof of that fact, and if the purported reply was not sent by some one having authority to enter into a contract on its behalf, the matter was peculiarly within its knowledge, and might easily have been shown. Unless forgery by some or fraud upon the part of the telegraph company is to be presumed, the delivery of the message to respondent at Rowena by its operator is a proper circumstance, tending strongly to show that on the very day respondent, F. R. Wright, sent his message to Chicago, appellant placed its reply thereto in transit over the wires: Scott & J. Tel., par. 380. Were a doctrine to prevail contrary to that which applies to a letter in the hands of its recipient, and which purports to be an answer to one he has written, and which was received by

the party addressed, an agency by which the most important of human affairs are constantly transacted would be seriously impaired, and a distinction would be made to exist without a material difference."

So, also, in Taylor v. Steamboat Robert Campbell, 20 Mo. 254, it was observed: "Private communications relative to business, made by means of a telegraph, are usually relied on, and that reliance has not proved unfounded. Where men consent to use the telegraph for the purpose of making an agreement, there is no hardship in submitting to a jury, as evidence of their consent to such an agreement, those facts and circumstances which are received by and acted on by mankind, in communicating through that medium."

Likewise in New York it has been held that a telegraphic reply to a letter requesting information is prima facie genuine: Thorpe v. Philbin, 3 N. Y. Supp. 939. But in several cases it has been held that the telegram placed with the telegraph company for transmission is the original, and hence that the reply telegram is not admissible on a mere showing that it is in reply to another communication: Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Howley v. Whipple, 48 N. H. 487.

In this connection, see subdivision II, and also the following subdivision.

C. Presumption Arising from Delivery of Telegram to Telegraph Office for Transmission. A presumption of delivery results from intrusting to a telegraph company for transmission a telegram properly addressed in the same manner as that which follows the posting of a letter duly stamped and addressed for transmission by means of the United States mail. This presumption results not only from the manner in which telegraph companies conduct their business respecting the certainty of delivery, but also by reason of the relation of the telegraph company to the public, which is that of a public carrier of intelligence with rights and duties analogous to those of a carrier of goods and passengers: State v. Gritzner, 134 Mo. 512, 36 S. W. 39; Perry v. German-American Bank, 53 Neb. 89, 68 Am. St. Rep. 593, 73 N. W. 358; Western Twine Co. v. Wright, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438. The presumption that a telegram has been delivered in the regular course of business to the person to whom it was directed is one of fact, subject, of course, to be disproved: Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301. It was stated in a New York case that the presumption of delivery of a telegram arising from its delivery to the company for transmission is somewhat weaker than the similar presumption which attaches to letters deposited in the mail: Oregon Steamship Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485.

Where there is testimony of a witness that he wrote and sent a telegram, it will be presumed, in the absence of an objection at the time of offering the testimony, that it was sent in the ordinary manner, to wit, by delivering it to a telegraph company for transmission

with the charges prepaid: Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301.

2. **Necessity to Produce the Original Telegram.**—As we have seen before, the question whether the telegram sent or the one received is the original depends upon which party is responsible for its transmission. If there is but a single communication, the telegram as delivered at the place of destination is the best evidence: Cobb v. Glenn Boom etc. Co., 57 W. Va. 49, ante, p. 734, 49 S. E. 1005. Since the original telegram is the best evidence, it must be produced, but where from loss or other cause it cannot be produced, the next best evidence which the nature of the case admits of, must be furnished: Saveland v. Green, 40 Wis. 431. Every other evidence of the contents of a telegram outside of the original telegram itself is secondary, and as to its admissibility stands on the same footing, but, as has been observed: "One kind of secondary evidence—as, for instance, a written copy—may be more satisfactory than another, but it is no more admissible than any other secondary evidence": Magie v. Herman, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909. Where a copy of a telegram had been put in evidence without objection at a former trial and a letter acknowledging a telegram of the same purport is also in evidence, it is proper to admit the copy: Distad v. Shanklin, 15 S. Dak. 507, 90 N. W. 151.

c. **Right to Introduce Parol Evidence of Contents of Telegram.**

1. **Necessity to Show Loss of Original as Foundation.**—Before secondary evidence of the contents of a telegram are admissible, it is necessary to show that the original telegram is lost or destroyed: McCormick v. Joseph, 83 Ala. 401, 3 South. 796; Western Union Tel. Co. v. Way, 83 Ala. 542, 4 South. 844; Western Union Tel. Co. v. Hines, 94 Ga. 430, 20 S. E. 349; Kerr v. State, 105 Ga. 655, 31 S. E. 739; Cairo etc. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Chisholm v. Beaver Lake Lumber Co., 18 Ill. App. 131; Western Union Tel. Co. v. Hopkins, 49 Ind. 223; Douglas v. State, 18 Ind. App. 289, 48 N. E. 9; Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105; Wilson v. Minneapolis etc. R. Co., 31 Minn. 481, 18 N. W. 291; Nichols v. Howe, 43 Minn. 181, 45 N. W. 14; Williams v. Brickell, 37 Miss. 682, 75 Am. Dec. 88; Carlson v. Holm (Neb.), 95 N. W. 1125; Oregon Steamship Co. v. Otis, 100 N. Y. 446, 53 Am. Rep. 221, 3 N. E. 485; Prather v. Wilkins, 68 Tex. 187, 4 S. W. 252; Conner v. State, 23 Tex. App. 378, 5 S. W. 189; Western Union Tel. Co. v. Williford (Tex. Civ. App.), 27 S. W. 700; Durkee v. Vermont Central R. Co., 29 Vt. 127; State v. Hopkins, 50 Vt. 316; Flint v. Kennedy, 33 Fed. 820.

2. **What Constitutes a Sufficient Foundation.**—Of course, where it is not shown that a telegram was reduced to writing, either when sent or when received, parol evidence of its contents is admissible as evidence of a primary character: Terre-Haute etc. R. Co. v. Stockwell, 118 Ind. 98, 20 N. E. 650. Where it is shown that it is a rule

of the telegraph office to destroy all original telegrams after six months, it is sufficient foundation to allow a copy of the telegram in evidence where it is shown that the six months have elapsed since the sending of the telegram: Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107; Western Union Tel. Co. v. Collins, 45 Kan. 88, 25 Pac. 187; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Ward v. Tennessee etc. R. Co. (Tenn. Ch.), 57 S. W. 193. But the evidence of the fact of the original telegrams having been sent away or destroyed in accordance with the rule should be positive: Barons v. Brown, 25 Kan. 410. The rule of the telegraph company may be proved without introduction of the rule where it is not shown whether the rule was in writing: Riordan v. Guggerty, 74 Iowa, 688, 39 S. W. 107.

But where it is the custom of the telegraph company in case of a controversy or suit respecting a telegram within six months after the sending the telegram, to forward the telegram in controversy to the superintendent of the central office, it is necessary to show inquiry at such central office in order a lay a predicate for parol evidence of the contents of the telegram: Western Union Tel. Co. v. McMillan (Tex. Civ. App.), 25 S. W. 821.

A mere statement of a telegraph operator that he had "searched for it but could not find it," that some original telegrams "are destroyed and some sent to headquarters," and that "no search had been made at headquarters," is insufficient to allow secondary evidence: Blair v. Brown, 116 N. C. 631, 21 S. E. 434. And testimony of the operator in charge of the office that he had sent away all papers found in the office and had been informed that they were destroyed, is not a sufficient predicate for the reason that it is based on hearsay: American Union Tel. Co. v. Daughtery, 89 Ala. 191, 7 South. 660. But testimony of a witness that he had searched in the place where he usually kept his telegrams is a sufficient foundation for secondary evidence: Lindauer v. Meyberg, 27 Mo. App. 181. Merely testifying to a search without stating the result of the search is not sufficient: Newton v. Donnelly, 9 Ind. App. 359, 36 N. E. 769. But testimony that the witness had instructed his porter to destroy a number of papers, including the telegram, has been held sufficient foundation for secondary evidence of its contents: Western Union Tel. Co. v. Kemp, 55 Ill. App. 583.

3. **Necessity for Notice to Produce Original Telegram.**—The same rule applies to telegrams as is applicable to other writings with respect to the necessity for a notice to produce the original telegram before secondary evidence of its contents is admissible: Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Western Union Tel. Co. v. Hines, 94 Ga. 430, 20 S. E. 349; Western Union Tel. Co. v. Kapp, 35 Tex. Civ. App. 663, 80 S. W. 840. But where from the nature of the action, as, for instance, where the suit is against the telegraph company for its failure to deliver the telegram, the opposite party is charged with its possession, a notice to produce is not necessary: Reliance

Lumber Co. v. Western Union Tel. Co., 58 Tex. 394, 44 Am. Rep. 620. Likewise, where the original telegram is beyond the jurisdiction of the court, secondary evidence is admissible: Whilden v. Merchants' etc. Bank, 64 Ala. 1, 38 Am. Rep. 1; Elwell v. Mersick, 50 Conn. 272; Western Union Tel. Co. v. Smith (Tex. Civ. App.), 26 S. W. 216. But of course the fact that the original telegrams are outside of the jurisdiction of the court does not authorize the introduction of copies until the genuineness of the telegrams or the authority of the person sending them has been established: Cobb v. Glenn Boom etc. Co., 57 W. Va. 49, ante, p. 734, 49 S. E. 1005. The telegraph company cannot refuse to produce the telegrams on the ground that they are privileged communications: State v. Litchfield, 58 Me. 267; Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; National Bank v. National Bank, 7 W. Va. 544. But the sub forma duces tecum should describe the telegrams wanted with such certainty as is practicable, considering all the circumstances of the case: Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; United States v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484.

d. Telegrams as Evidence in Criminal Cases.—The same general rules respecting the admissibility of telegrams in civil cases applies to criminal cases, with the same exceptions which obtain with respect to all criminal cases.

Telegrams are admissible against a defendant as evidence of his declarations and also as tending to show communications to the person to whom they were addressed, if proved to be in his handwriting, and to have been received at the telegraph office, and sent over the wires properly directed to a person who was then living at the place of their destination: Commonwealth v. Jeffries, 7 Allen, 548, 83 Am. Dec. 712. And where it is shown that a witness sent a telegram to defendant and received an answer, and the original telegrams were destroyed by the company, the answer is admissible without direct proof that it was sent by defendant: People v. Hammond, 132 Mich. 422, 93 N. W. 1084. An admission by the defendant against whom a telegram is sought to be introduced that he sent it, is sufficient foundation for its admission: Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. Rep. 325, 39 L. ed. 390. But it has been held that a reply message to one sent by the defendant is not admissible on the ground that the defendant is entitled to be confronted with the witnesses against him: Chester v. State, 23 Tex. App. 577, 5 S. W. 125. Though telegrams of fellow-conspirators among themselves or to others for the purpose of promoting the objects of the conspiracy are admissible: United States v. Babcock, 3 Dill. 581, Fed. Cas. No. 14,487.

It is immaterial whether the telegram put in evidence has been produced voluntarily in compliance with a rule of the telegraph company or involuntarily under an order of court made in defiance of the rule: State v. Sawtelle, 66 N. H. 488, 32 Atl. 831.

In a prosecution for horse theft a telegraphic offer to sell horses is admissible in connection with evidence tending to show preparation for flight: State v. Espinozli, 20 Nev. 209, 19 Pac. 677. And in a prosecution for "dealing in options" where the defendant was engaged in the grain business, telegrams to commission brokers to "Buy five wheat" will be presumed to be respecting lawful business matters. And it must be shown that the telegrams were received by the telegraph company at its office at the point of delivery: State v. Gritzner, 134 Mo. 512, 36 S. W. 39. In a prosecution of a passenger, who had been injured in a railroad collision, for false pretenses in obtaining a settlement for injuries which he did not suffer in the collision, telegrams to the claim agent of the railroad from other employés of the road have been held admissible: Commonwealth v. Burton, 183 Mass. 461, 67 N. E. 419.

e. Telegrams as Evidence of Written Notice in Legal Proceedings.—Telegrams have been recognized as written notices in various legal proceedings, where it was required to show that written notice had been given relative to some phase of the case or proceeding: Western Union Tel. Co. v. Bailey, 115 Ga. 125, 42 S. E. 89, 61 L. R. A. 933; Morgan v. People, 59 Ill. 58; Kaufman v. Wilson, 29 Ind. 504; State v. Holmes, 56 Iowa, 588, 41 Am. Rep. 121, 9 N. W. 844; Cape May etc. R. Co. v. Johnson, 35 N. J. Eq. 422; Schofield v. Horse Springs Cattle Co., 65 Fed. 433; In re Bryant, L. R. 4 Ch. D. 98; Ex parte Langley, L. R. 13 Ch. D. 110.

NATIONAL TUBE COMPANY v. SMITH.

[57 W. Va. 210, 50 S. E. 717.]

EXEMPTION LAWS of one state pertain solely to the remedy and will not be enforced in another state. (p. 773.)

EXEMPTION—Garnishment—Injunction.—An injunction will not lie against a garnishment of money owing by the garnishee to a nonresident debtor, on the ground that such money is exempt by the law of the state where such debtor resides. (p. 775.)

EQUITY JURISDICTION—Garnishment—Multiplicity of Suits. Although a person is garnished by different persons on distinct and separate demands, the fact that the same question of law may arise in all of the cases does not give equity jurisdiction to enjoin the suits to prevent a multiplicity of actions. (pp. 775, 776.)

EQUITY JURISDICTION.—Injunction—Interest in Action.—Equity has no jurisdiction to enjoin a justice of the peace from acting in an action before him because of his interest in the subject matter of the suit. (p. 776.)

INJUNCTION—Garnishment—Suits in Different States.—An injunction will not lie to restrain the prosecution of a garnishment proceeding in one state, on the ground that an injunction is later sued out in another state and is pending, to enjoin the garnishee from paying the money under any judgment rendered in such garnishment proceeding. (p. 776.)

W. H. Hearne, for the appellant.

Stenz & Hitchins and Russell & Russell, for the appellee.

[211] BRANNON, P. The National Tube Company filed a bill in equity in Ohio county against George O. Smith, stating that it is a New Jersey corporation doing business in this state in the manufacture of steel and iron tubing, and employing many thousands of men in this and other states; that said Smith, a resident of West Virginia, had brought one hundred and forty-two suits before justices of the peace of Ohio county against employés of the company residing in Pennsylvania on claims assigned to Smith, contracted in Pennsylvania with residents of Pennsylvania and still residing in it; that no process in the suits had been served on the nonresident debtors, but that attachments had been issued in them and served on the company as garnishee; that said suits were a great burden and annoyance to the company; that Smith had been long engaged in the pretended buying of claims arising in other states against employés of foreign corporations and suing on [212] them in Ohio county, and garnishing foreign corporations doing business there, either paying small value for claims or on agreement for half the recovery; that the claims thus purchased were debts against persons who became debtors in Pennsylvania, and that they, as employés of said company, had earned wages in that state for which the company was garnished, and the purpose of said assignment and suit in West Virginia was to evade the statute of Pennsylvania which entitled those employés to exempt such wages from subjection to the debts sued on; that not only were those employés entitled to the exemption, but a Pennsylvania statute made the assignments of the claim illegal and void. The bill charged that the purchase of the claims by Smith was champertous; also that an arrangement had been made between Smith and the justices that no justice's fees were to be charged Smith, unless the company should answer that it had funds of the debtors, and that this is contrary to public policy; that one of the debtors sued before the justice, Javens, had obtained from a court in Pennsylvania an injunction restraining the company from paying Smith the money owed by the company to Javens and that others were about to enjoin; that if judgment should be given by the justices in Ohio county, the company would likely be sued for the same money in Pennsylvania and be compelled to pay over again the same debts and thus lose a large sum. The bill

asked an injunction against Smith to forbid him from prosecuting said pending suits or instituting other suits on like claims, and injunction was awarded, but afterward on demurrer the bill was dismissed and the injunction dissolved and the company appealed.

The defendant contests the jurisdiction of equity to entertain this suit. One ground on which the plaintiff rests such jurisdiction is, that the debts due from the defendant are for wages of laboring men in the service of the company, and that those laborers earned the wages in the state of Pennsylvania, and reside there, and by its laws such wages are exempt from the debts to which it is sought by the garnishment of the defendant in this state to subject them to debts there made, and that those debts were assigned and sued upon in this state with purpose to evade the exemption law of Pennsylvania. To sustain this ground for jurisdiction we must practically enforce [213] the law of another state, in contradiction of the rule that the laws of a state have no force beyond its territorial limits, and therefore exemption laws of another state, which pertain to remedy merely, will not be enforced in this state: Stevens v. Brown, 20 W. Va. 450; 12 Am. & Eng. Ency. of Law, 2d ed., 78. But we are told that jurisdiction under this head is sustained by 12 American and English Encyclopedia of Law, second edition, 80, saying: "That the rule of comity between states will not permit a creditor residing in one state, or his assignee, to avail himself of the process of the courts of another state for the purpose of evading the exemption laws of his own state, and if he attempts to do so, such law should be recognized and effect given to them." It may be safely asserted that this is not the sound rule, as appears from the same volume, page 78. We find in that volume, page 256: "It may be regarded as settled that a court of equity has jurisdiction to enjoin a resident creditor from instituting or prosecuting an action or proceeding in another state for the purpose of evading the exemption laws of this state, and of collecting his claim by subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the state. And in such a case an injunction should generally be granted."

This means that injunction lies in one state to enforce its own exemption law. It means that an injunction will go against a person resident in a state, to operate in person on

him, to prevent his suing in another state to subject in that other state wages exempt in favor of person residing in the former state, which would be exempt if he were sued there. This is not enforcing the law of another state. It seems both creditor and debtor must reside in the same state for such injunction. The case of Kansas City etc. Ry. Co. v. Cunningham, 7 Kan. App. 47, 51 Pac. 972, holds that Kansas will execute the exemption law of another state and protect wages of employés earned in another exempt by its laws. Say the same of Missouri Pac. Ry. Co. v. Maltby, 34 Kan. 125, 8 Pac. 235. Without disregarding Stevens v. Brown, 20 W. Va. 450, and the current of authority, we cannot so hold. I add that the Maltby case says that the wages were exempt under the exemption law of both states. Further, they were not injunctions. They were contests in the garnishee cases. They do not aid equity [214] jurisdiction. Drake v. Lake Shore etc. R. R., 69 Mich. 168, 13 Am. St. Rep. 399, 37 N. W. 70, was not injunction, but appeal in a garnishment case. It holds that assignment of a debt to assist the creditor to evade the exemption law of a state by suit in another state is invalid. That is a matter contestable in the garnishment suit. So with the holding that such wages cannot be attached. These cases are not our question—which is, equity jurisdiction in this case. Wright v. Chicago etc. R. R., 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90, only holds that Nebraska's exemption law applies to nonresidents. It was in the same action also, and does not touch jurisdiction of equity. Chicago etc. R. R. Co. v. Moore, 31 Neb. 628, 28 Am. St. Rep. 534, 48 N. W. 475, does not touch our question, because it simply holds that a valid judgment on garnishment is good in another state and payment of it protects the garnishee. Wabash R. R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594, involved the right to garnish in another state, the right being tried in the same suit. It does not touch equity jurisdiction. Pierce v. Chicago etc. Ry. Co., 36 Wis. 283, touches what the garnishee must do in defense, the force of a judgment against him, and the presumption that the exemption laws of the two states are the same. Martin v. Central Vt. Ry. Co., 50 Hun, 347, 3 N. Y. Supp. 82, is upon the force of a judgment on garnishment in another state, arising in an action to compel payment over again of wages, in which also it was said it seems such wages are not attachable. It does not touch equity jurisdiction. The law above last quoted does not mean, for illustra-

tion, that injunction lies in West Virginia to enjoin garnishment here of wages earned in another state, payable there to a person there resident, though exempt by the law of that other state.

Pennsylvania could thus enjoin the owners of debts there resident from suing in West Virginia to subject wages going to persons resident in Pennsylvania and exempt by its law. Injunction is given in the case above supposed, where it lies, as there is no other remedy, as the state where the suit is will not enforce the law of the other state under which exemption is claimed. I think the cases will show this to be the case: Allen v. Buchannan, 97 Ala. 399, 38 Am. St. Rep. 187; Mumper v. Wilson, 72 Iowa, 163, 2 Am. St. Rep. 238, and note, 33 N. W. 449; Stewart v. Thompson, 97 Ky. 575, 53 Am. St. Rep. 431, 31 S. W. 133, 36 L. R. A. 582; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Freeman on Execution, sec. 209. Injunction can prevent one in a state from carrying on a suit in another state: State v. Fredlock, 52 W. Va. 232, 94 Am. St. Rep. 932, 40 S. E. 153.

[215] Jurisdiction in equity cannot be on the ground of avoiding multiplicity of suits. These demands are in favor of different persons, against different persons, having no connection with each other, not at all upon a common demand. the demand resting on and involving different facts. The mere fact that the garnishment is of one debtor will not give jurisdiction, though there is a legal question common to all—that is, whether wages earned in Pennsylvania by persons resident there, payable there, exempt by its laws, can be assigned or garnished in West Virginia at all against a foreign corporation. There is no fund common to, or in contest between, divers persons—no community of interest. The statement of equity jurisdiction to avoid multiplicity of suits in Hogg's Equity Principles, 469, will not justify this case. "Injunction will not lie to prevent multiplicity of suits which would lie between different parties, though the issue in each case must be determined on the same state of facts." "Equity will not stay a creditor in his effort to secure the money which his debtor owes him, from the fact that there are many creditors pursuing the same debtor, and there will be a multiplicity of suits. Attachment creditors, whose debts are distinct and arise out of separate transactions, who had no common interests, cannot be joined by the debtor in one suit in equity, in order to avoid multiplicity of suits. And

generally actions by different persons on distinct and separate grounds do not constitute a multiplicity of suits which a court of equity will enjoin": Beach on Injunctions sec. 539; High on Injunctions, sec. 65. The fact that the same question of law arises as to the several debts does not give such jurisdiction: Murphy v. Mayor, 6 Houst. 108, 22 Am. St. Rep. 345; Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 35 Am. St. Rep. 642, 12 South. 32, 19 L. R. A. 660.

Equity jurisdiction cannot stand on the theory that the justices have an illegal arrangement with Smith touching fees. If the justices have such interest as renders them unjust, partial judges, the remedy is not injunction, but prohibition: 16 Ency. of Pl. & Pr. 1124; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238.

Equity jurisdiction cannot be sustained on the ground that injunctions are, or will be, instituted in Pennsylvania against payment to Smith under a West Virginia recovery against the company. The plea of another suit pending will not be [216] good if the suit is pending in a court of another state: 1 Cyc. 36; Fletcher on Equity Pleading and Practice, sec. 258; Stanton v. Embry, 93 U. S. 548, 23 L. ed. 983; Insurance Co. v. Brune, 96 U. S. 588, 24 L. ed. 737; Davis v. Morris' Exr., 76 Va. 21. It is true that there is an exception to the above rule, namely, that when there is garnishment in one state and an action in another state for the same debt garnished, the garnishment suit, if prior in date, may be pleaded to abate or suspend the latter suit, because the garnishment fastens the debt, and the garnishee may be compelled to pay the debt twice, if the action is not abated or suspended until the decision of the garnishment suit: 1 Cyc. 37; 9 Ency. of Pl. & Pr. 857. But the two suits must involve the recovery of the same demand. The Pennsylvania suit is not to recover the debt, but is only an injunction prohibiting the company from paying under the garnishment, and besides is later in date: 1 Cyc. 38. Rather might we say that the West Virginia suit could be pleaded in the Pennsylvania suit. The law adverted to would say that the pendency of the garnishment could be pleaded in an action at law by the creditor to recover the debt garnished from the garnishee; but this state of things is not before us. It is claimed that we issue an injunction.

There being no jurisdiction in equity, we do not discuss the assignability of the demands on which the actions before the justice were brought, whether the claims were assigned,

whether there was jurisdiction in the justices to garnish the plaintiff company, whether the assignment was void, or any question involved in the merits. Those questions are cognizable in the actions before the justices and on appeal.

Therefore, we affirm the decree simply for want of jurisdiction for the injunction.

Exemption Laws have no Extraterritorial effect. Hence in an action in North Carolina the exemption laws of Virginia cannot be relied on, though the plaintiff and defendant are residents of the state: Goodwin v. Claytor, 137 N. C. 224, 107 Am. St. Rep. 479, and see the cases cited in the cross-reference note thereto.

Injunctions against the Prosecution of Actions in another state or country are discussed in the monographic note to Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 879. If a creditor and debtor are citizens and residents of the same state, and the creditor institutes an action by attachment and garnishment proceedings in another state to reach property or credits due the debtor there, and exempt from legal process in the state where the parties are domiciled, such creditor may be enjoined from further prosecuting such action in the other state: Allen v. Buchanan, 97 Ala. 399, 38 Am. St. Rep. 187. See, in this connection, Griggs v. Docter, 89 Wis. 161, 46 Am. St. Rep. 824; Wyeth Hardware Co. v. Lang, 127 Mo. 242, 48 Am. St. Rep. 626: Kendall v. McClure Coke Co., 182 Pa. St. 1, 61 Am. St. Rep. 688.

WALLACE v. LEROY.

[57 W. Va. 263, 50 S. E. 243.]

ASSIGNMENT OF ACCOUNT—Action on—Want of Consideration.—If the statute authorized an action at law by the assignee under an assignment of an account, the debtor cannot raise the objection of a want of consideration for the assignment. (p. 779.)

INFANCY—Plea of—Action for Purchase Money.—In an action against an infant to recover the purchase money of property sold to him, part of the proceeds of which he still retains, he is entitled to the plea of infancy as a defense, without having returned or offered to return such property or proceeds. The successful intervention of such plea confers upon the person who made the sale to the infant only the right to reclaim his property or such part of it as remains in the possession of the infant. (p. 781.)

INFANCY—Plea of—Effect on Attachment.—In an action against an infant to recover the purchase price of goods sold to him and by him resold, and the proceeds of which have been attached in the hands of a third person, the successful intervention by such infant of his plea of infancy annuls the contract, defeats the collection of the debt, dissolves the attachment, and releases the funds. (p. 781.)

INFANCY is No Defense to an action for the purchase money of articles furnished to an infant which are necessary to his subsistence and comfort, and to enable him to live according to his real position in society. (p. 781.)

INFANCY.—Articles Furnished Infants for Use in Business, such as merchandising, farming or conducting a shop of any kind, are not regarded as necessaries, for which he can be bound. (p. 781.)

APPEAL—Jurisdiction.—The Amount Claimed by the appellant in the court below, and not the amount which he was really entitled to recover, is the test of appellate jurisdiction. (p. 784.)

APPEAL—Jurisdiction—Costs.—If the amount in controversy is sufficient to confer appellate jurisdiction, but the appellant is prejudiced by an error in sum less than the jurisdictional amount, costs in the appellate court must be adjudged to the appellee. (p. 784.)

Wallace & Fitzpatrick, for the appellant.

J. W. Perry and G. I. Neal, for the appellee.

[264] POFFENBARGER, J. This case is governed by legal principles applicable to contracts made by persons affected by the disability of infancy. Charles Leroy, an orphan boy, dependent upon his own resources for a living, owned and managed a cigar-stand in the Florentine Hotel at Huntington, West Virginia, prior to May 29, 1902, and became indebted to a number of persons and firms for cigars, board, rent and other things. Having become embarrassed, he gave his creditors worthless checks, moved part of his stock into the basement of an adjoining building, prepared to leave the city, and, on the day above named, sold all his stock of goods to A. A. Hanly and departed. George S. Wallace, an attorney to whom several claims against Leroy, amounting to nearly three hundred dollars, had been delivered for collection, took assignments of them, and, on the day of the sale to Hanly, instituted an action against Leroy before a justice of the peace, in which an attachment was sued out and copies thereof served on Hanly and other persons who were supposed to be indebted to the defendant, or to have property in their hands belonging to him. Hanly answered, admitting indebtedness on account of the purchase money of the property, amounting to $371.72. The defendant appeared by guardian ad litem and set up his infancy, among other defenses. A jury was waived, and the justice rendered a judgment in favor of the plaintiff for two hundred and sixty-nine dollars and seventy-two cents and ordered the garnishee to pay the same, together with the costs, out of the money so due from him. In a trial de novo [265] by a jury in the circuit court on appeal, a demurrer to the evidence was sustained by the court and a judgment of nihil capiat entered.

As grounds for reversal of this judgment, it is argued that, although the plea of infancy, sustained by proof, abrogated

the contracts upon which the claims sued for were predicated, the plaintiff was entitled to have, not a personal judgment against the defendant for the amount of the claims, but satisfaction of them out of the proceeds of the property which the defendant sold to the garnishee. For the defendant, it is urged that the judgment is right for two reasons: 1. That the plaintiff showed no title to, or interest in, the claims on which he sued; and 2. Conceding his right to sue, although he might be entitled to have the proceeds of any property sold which had belonged to the plaintiff, or the purchase money of which is represented by the claims in suit, he has wholly failed to show that the funds in the hands of the garnishee arose from property purchased from the plaintiff or any of his assignors.

The fact of assignment is not denied, but it is said there was not a sufficient consideration. As to this no inquiry could be permitted in a court of law. Section 14 of chapter 99 gives an assignee of an account, as well as of a bond or note, the right to maintain an action thereon in his own name. This statute does not pass the legal title, but it does pass the equitable title, together with a right of action at law: Clarke v. Hogeman, 13 W. Va. 718; Garland v. Richeson, 4 Rand. 266; Whitteker v. Gas Co., 16 W. Va. 717, Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812. The plaintiff, however, was put to the proof of his title and showed that his interest was a certain percentage of the claims in consideration of his collecting them. This made him, of course, equitably not the sole, but a joint, owner with the assignors. However, he obtained the statutory right to sue by virtue of the assignment, whatever the consideration my have been. That he was only a trustee for his assignors as to parts of the claims can make no difference. That is a matter for settlement between them in which the debtor has no interest, and of which he cannot complain. Where the assignment would, at common law, pass the legal title, or where the statute authorizes an action at law under an assignment [266] the debtor cannot raise the objection of want of consideration, for his only duty is to pay, and to whom the payment is to be made is necessarily immaterial to him: 4 Cyc. 31, 32.

The effect of the establishment of the fact of infancy depends upon the forum in which it is set up, the right in controversy, the time at which the benefit of it is claimed and other conditions. Since the rules, principles and processes

of courts of equity are, in many respects, essentially different from those applied in courts of law, a party asserting rights, to which he is entitled by reason of the disability of infancy may, in equity, be compelled to submit to conditions unknown to the common-law courts. As a condition of obtaining relief, he may be required to do equity or to come into court with clean hands. For principles governing the procedure in equity in such cases, some of which are not applicable here, this being an action at law, see Mustard v. Wohlford's Heirs, 15 Gratt. 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Gratt. 857; Gillispie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

Nor is this a possessory action by the infant to recover back specific property sold or bartered away by him. In such case, he seeks to undo an executed contract and to set up title to property, and many cases hold that he must return the money or the property he received in exchange for it, if he is able to do so: 1 Minor's Institutes, 525; Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Weed v. Beebe, 21 Vt. 495; Kitchen v. Lee, 11 Paige, 107; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Boody v. McKinney, 23 Me. 517; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732. What acts of disaffirmance would be sufficient to revest the title in him need not be indicated here.

Many of the reported cases present instances of disaffirmance by infants after having attained their majorities in which it is necessary to determine whether there has been a ratification. Aside from the question of ratification, this is important where the contract was one of sale of the infant's land, for it is said he cannot disaffirm such sale before he reaches maturity, since it requires as much discretion and judgment to rescind as to make a contract: 1 Minor's Institutes, 523. But he may have possession of the land against his contract while under age.

This is a mere personal contract whereby the infant has [267] obligated himself to pay money, and which he repudiates while under age. Though executed on the part of the plaintiff's assignors, it is executory on his part. He is not seeking to recover either property or money, but simply defending against a demand for money. To avail himself of this defense, he need not return, or offer to return, what he has received: Weed v. Beebe, 21 Vt. 495; Fitts v. Hall, 9 N. H. 441; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146;

Aldrich v. Grimes, 10 N. H. 194; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. However, the legal effect of the plea, sustained by proof, is to annul the contract and revest in the assignors of plaintiff, as against the defendant, the title to the property they sold him. If he has any of it, they may recover it from him by any proper possessory remedy: 1 Minor's Institutes, 524; 16 Am. & Eng. Ency. of Law, 294; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Nolan v. Jones, 53 Iowa, 387, 5 N. W. 572; Strain v. Wright, 7 Ga. 568; Brantley v. Wolf, 60 Miss. 420; Evans v. Morgan, 69 Miss. 328, 12 South. 270. This confers upon the party who made the sale to the infant the right to reclaim his property, which is essentially different from the right to recover damages for breach of a contract. There must be restoration, but not by tender or return of the property, at or before pleading infancy against the money demand. It follows as a legal consequence, to be enforced by a separate, subsequent appropriate proceeding.

The foregoing propositions are subject, however, to the qualification that infancy is no defense to an action for the purchase money of articles furnished to an infant which are necessary to his subsistence and comfort, and to enable him to live according to his real position in society: 1 Minor's Institutes, 510; 2 Kent's Commentaries, 230; Gayle v. Hayes' Admr., 79 Va. 547; Coke's Littleton, 172a; Oliver v. McDuffie, 28 Ga. 522; Locke v. Smith, 41 N. H. 346; Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761; Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Wilhelm v. Hardman, 13 Md. 140; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569, note p. 643, 13 N. W. 906 et seq. But as the law does not contemplate that an infant shall carry on any business which necessitates or involves the making of contracts on his personal responsibility, articles furnished to him for use in business, such as merchandising, farming or conducting a shop of any kind, are not regarded as necessaries: 16 Am. & [268] Eng. Ency. of Law, 277. Chairs for a barber-shop are not necessaries: Ryan v. Smith, 165 Mass. 303, 43 N. E. 109. Nor are goods bought to replenish a stock of merchandise: Whittingham v. Hill, Cro. Jac. 494; Whywall v. Champion, 2 Strange, 1083. Nor can an infant bind himself for work done in the course of business: Dilk v. Keighley, 2 Esp. 480. A horse purchased for use in cultivating a farm is not a necessary: Rainwater v. Durham, 2 Nott. & M. 524,

10 Am. Dec. 637. An infant is not liable on his contract for repairs to his dwelling-house: Tupper v. Caldwell, 12 Met. 559, 46 Am. Dec. 704. Many other illustrations of this principle may be found in the books. Subsistence is, of course, an absolute necessity. One of the small claims sued on here is for board, amounting to thirteen dollars and twenty-five cents. None of the others can be regarded as necessaries.

The application of these principles makes it impossible to sustain the view taken by counsel for the plaintiff in error, as to any part of the demand, except the one for board. He is unable to establish a debt against the defendant. This is admitted. What its effect upon the title to the property in the hands of the purchaser from the defendant may be is a question not now presented for adjudication. This action is not to recover that property or its proceeds in the hands of the purchaser as the property of the plaintiff, but to obtain a personal judgment against the defendant, to the discharge and satisfaction of which the purchase money is sought to be appropriated by means of the garnishment, which is in the nature of an execution for the enforcement of satisfaction of a judgment out of the defendant's property. By his disaffirmance of the contract, the basis for a judgment against him has failed. What remains is a mere right to follow up property, which can no more constitute ground for a personal judgment, than did the contract itself, after the defense of infancy had been made out. By allowing a personal judgment on that ground, the court would virtually make and enforce a new contract of sale between the parties. Escape from this logical result is attempted by saying the case is analogous to a proceeding against a nonresident, in which, although no personal judgment can be taken except upon appearance, the defendant's property may, nevertheless, be subjected to sale for satisfaction of the debt. But the cases [269] cannot be assimilated. In an attachment against a nonresident, proceeded against by order of publication and not appearing, it must be shown prima facie that there is a debt due from the defendant to the plaintiff, and that the attached property belongs to the former. Both of these conditions are wanting in the case now under consideration.

Moreover, it was the right of action arising out of the contract and no other, that the plaintiff acquired by the assignment. If the property obtained by the defendant under the contract still remained in his hands, it would be the subject of an in-

dependent action for its recovery, and if any part of the proceeds of that property remaining in the hands of the garnishee can be recovered, it also gives rise to a cause of action distinct from, and independent of, that arising from the contract to which the plaintiff had not shown himself entitled by any assignment. It is a right to follow up and reclaim the plaintiff's own property, not a right of action for damages, consequent upon a breach of contract. What, then, in this case, except the claim for board, can afford a shadow of basis for recovery? Absolutely nothing. As there can be no judgment against the defendant, the attachment must wholly fail. There is nothing to be satisfied. There being no debt, there can be no attachment to seize and hold the property of the defendant to satisfy a debt.

Counsel for plaintiff in error rely upon Evans v. Morgan, 69 Miss. 328, 12 South. 270, to sustain their contention, but upon examination it is found to be exactly contrary thereto. An infant engaged in merchandising became indebted and then made a fraudulent sale of his stock of goods to his father. In an action at law he set up, and defeated his creditors by, his plea of infancy. They then brought a suit in equity to set aside the sale and subject the property to the payment of their debt. Although unable to identify their property, the court held that they were entitled to have satisfaction out of the proceeds of the property, because the proof showed that it had been so mingled by the defendant with other property as to destroy its identity. While the creditors in that case were thus permitted to resort to the property for their satisfaction, their remedy was entirely different, not only as to the forum, but also in its nature. [270] It proceeded upon the theory that the contract had been abrogated, and the creditors were following up and recovering their property, and not merely seeking to enforce the contract.

As to the item of thirteen dollars and twenty-five cents the claim for board, the court should have found for the plaintiff. Under principles announced in Bee v. Burdett, 23 W. Va. 744, the error, though involving an amount far below the jurisdiction of this court, calls for a reversal of the judgment, if the amount in controversy was sufficient to confer appellate jurisdiction. Plaintiff claimed nearly three hundred dollars, none of which was allowed him. This, not the amount he was entitled to recover, is the test of appellate jurisdiction: Bee v. Burdett, 23 W. Va. 744; Love v. Pickens, 26 W. Va. 341;

Rymer v. Hawkins, 18 W. Va. 309; Aspinal v. Barrickman, 29 W. Va. 508, 2 S. E. 795. But where the amount in controversy is sufficient to give appellate jurisdiction, and the plaintiff is prejudiced by an error in a sum less than the jurisdictional amount, costs in this court must be adjudged to the defendant in error: Bee v. Burdett, 23 W. Va. 744.

From these principles and conclusions, it results that the judgment of the circuit court must be reversed and a judgment rendered in favor of the plaintiff for the said sum of thirteen dollars and twenty-five cents, with interest thereon from the twenty-eighth day of May, 1902, until the fourth day of April, 1904, amounting in the aggregate to fourteen dollars and fifty-nine cents, with interest thereon from said last mentioned date until paid, which judgment A. A. Hanley, the garnishee, must satisfy out of the funds in his hands belonging to the defendant. As the recovery in the justice's court has been largely reduced, the awarding of costs is in the discretion of the court: Code, c. 50, sec. 171. The recovery is very small and the costs made in the justice's court seem to be disproportionally large—twenty-one dollars and fifty cents. We therefore refuse to allow the costs in the justice's court and in the court below to either party, but costs in this court are adjudged to the defendant in error as the party substantially prevailing.

The Contracts of Infants are discussed at length in the monographic note to Craig v. Van Bebber, 18 Am. St. Rep. 573-724. Some authorities affirm that an infant is not obliged to put the other party in statu quo. in order to avoid his contract: Simpson v. Prudential Ins. Co., 184 Mass. 348, 100 Am. St. Rep. 560. There are modifications of this general rule, however: Jenkins v. Jensen, 24 Utah, 108, 91 Am. St. Rep. 783; United States Inv. Corp. v. Ulrickson, 84 Minn. 14, 87 Am. St. Rep. 326; Rice v. Butler, 160 N. Y. 578, 73 Am. St. Rep. 703; Gillis v. Goodwin, 180 Mass. 140, 91 Am. St. Rep. 265.

That an Infant is Liable for the reasonable value of necessaries furnished him is well understood: Crafts v. Carr, 24 R. I. 397, 96 Am. St. Rep. 721; Pardy v. American Ship etc. Co., 20 R. I. 147, 78 Am. St. Rep. 844; Englebert v. Troxell, 40 Neb. 195, 42 Neb. 665.

GUYANDOT VALLEY RAILWAY COMPANY v. BUSKIRK.

[57 W. Va. 417, 50 S. E. 521.]

EMINENT DOMAIN—Measure of Compensation.—If, in condemnation proceedings, the whole of a lot of land is sought to be taken, the compensation due the owner is its market value at the time of its appropriation, without any deduction for benefits or appreciation in value, general and common to the community in which the land is situated, and due to the contemplated improvement for which the land is taken. (p. 792.)

EMINENT DOMAIN—Measure of Compensation.—In assessing the compensation to be made for land taken under the right of eminent domain, its value at the time of the condemnation must be considered, and the owner is entitled to the benefit of an advance caused by the prospective improvement. (p. 793.)

EMINENT DOMAIN — Compensation — Market Value. — The market value of land to which the owner is entitled in condemnation proceedings is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell, and is bought by one who wishes to buy, but who is under no necessity of having it. (p. 796.)

EMINENT DOMAIN.—**Market Value of Land** in condemnation proceedings is to be determined by the availability of the land for all valuable uses to which it is adapted, having regard to the business and wants of the community, or such as may be reasonably expected in the immediate future. (p. 797.)

EMINENT DOMAIN.—**Market Value of Land** in condemntion proceedings is not a value fixed by consensus of opinion in the community in which the land is situated, or among business men or dealers in real estate who are familiar with it, but such value is to be fixed by the jury upon consideration of all the evidence in the case, including the knowledge of the property, which the jury have acquired by a view of it. (p. 798.)

EMINENT DOMAIN—Evidence of Value—Purchase Price.—In condemnation proceedings, the price paid for the land by its owner is admissible in evidence as to its value, if not too remote in time. (p. 799.)

EMINENT DOMAIN—Evidence of Value of Land.—In condemnation proceedings, the opinions of persons residing near the land who have known it for a long time, though not real estate dealers, nor especially informed as to prices, are admissible in evidence on the question of its market value. (p. 799.)

NEW TRIAL—Refusal to Grant.—The trial court may, in its discretion, refuse to set aside a verdict and grant a new trial, when the sole ground for such application is the request of both parties to have another trial. (pp. 799, 800.)

McComas & Northcott, for the appellants.

Simms & Enslow and J. B. Wilkinson, for the appellee.

[418] POFFENBARGER, J. Charging error in the rulings of the court as to the admission and rejection of evidence and

the giving and [419] refusing of instructions concerning the measure and amount of compensation in a proceeding for the condemnation of real estate for railroad purposes, the defendants complain of a judgment of the circuit court of Logan county, awarding them three thousand dollars as just and full compensation for two adjoining lots owned by them and wholly taken for the purposes of the applicant's right of way for the road and station buildings.

These lots had been purchased by the defendant George R. Buskirk, at a judicial sale a few days before the fifth day of May, 1903, for the sum of eighteen hundred and twenty-five dollars. Pursuant to notice, the petition of the Guyandot Valley Railway Company, for the condemnation of the property, was filed and commissioners appointed on the twenty-seventh day of July, 1903, and the commissioners fixed the amount of the compensation at three thousand five hundred dollars and returned their report on the twenty-eighth day of July, 1903. Thereupon the applicant paid said sum into court and excepted to the report, and, together with the defendants, demanded that the amount of compensation be ascertained by a jury. At the jury trial, which occurred on the twenty-fourth day of November, 1903, numerous witnesses were introduced and examined in support of the contentions of both applicant and defendants.

Two inconsistent theories respecting the measure of compensation and the methods of applying the standard were presented to the court in the offerings of, and objections made to, evidence, and in the requests for, and objections made to, instructions, one by the applicant and the other by the defendants. That of the applicant was adopted and applied. As all the rulings complained of spring out of this proposition or theory, the application of a few general principles of law will suffice to dispose of all the assignments of error.

All the instructions requested by the defendants were refused. They read as follows:

"1. The court instructs the jury that if they find from all the evidence, facts and circumstances before them in this proceeding that the land mentioned and described in the notice, application and commissioners' report herein sought to be taken in this proceeding, is within the corporate limits of the town of Aracoma and at the time of the proposed taking thereof by the applicant, had a market value, then such [420] market value together with the view of the premises would

be the proper measure of compensation to be allowed by the jury to the defendants for the same.

"2. The court further instructs the jury that in ascertaining what would be a just compensation to the defendants for the land proposed to be taken by the applicant, The Guyandot Valley Railway Company, as set forth in the notice, application and commissioners' report in this proceeding, such general and intangible benefits as have accrued to this property in *comon* with all other property in the community where it is situate, by reason of the proposed building by the Guyandot Valley Railway Company of its road into said community cannot be deducted from its fair market value, if they find it had such value, at the time same was proposed to be taken by said Railway company.

"3. The *Couert* further instructs the jury that if they find from all the evidence, facts and circumstances in this proceeding before them, that the property described in the notice, application and commissioners' report in this proceeding, proposed to be taken by the Guyandot Valley Railway Company, had, at the time of the proposed taking thereof by said Company, a market value, then it would be improper for them to take into consideration in ascertaining a just compensation to be paid for said property, the price paid therefor by the defendants George R. Buskirk and U. B. Buskirk."

The different theory of the applicant was embodied in two instructions, given over the objection of the defendant, which read as follows:

"1. The court instructs the jury that in ascertaining what would be a just compensation to the owners for the land taken by the Railway Company in this proceeding for the uses and purposes of its road, that they must ascertain from all the evidence in this case as well as of their view of the land, the actual value of the land at the time when taken, without reference to any increased or enhanced value given to said land and *comon* to other land owners along the line of the road, by reason of the propective construction of the Railway Company's road through such land.

"2. The court further instructs the jury that although the owners of the land taken by the Railway Company in this [421] case, is entitled t orecover as a just compensation therefor the actual market value of the land at the time it was taken by the Railway Company, yet in ascertaining what the actual market value was at the time the land was so taken, the jury

cannot conclude in their verdict any increased or enhanced value to said land *comon* to other land owners along the line of the road, by reason of the prospective construction of the Railway Company's road through such lands, and in ascertaining the market value of said land, so taken, the jury must take into consideration their view of the land, together with all the facts and circumstances now in evidence in the case."

As the whole of the property is taken by the appellant, leaving no residue to be damaged or benefited, the principles governing the ascertainment of damages, as contradistinguished from the value of the land actually taken, have no application, and are not to be considered except by way of elaboration in the discussion of the rules and principles which govern the ascertainment of the value of land taken, to the end that no inconsistent position may be assumed.

Benefits, whether general and common to all property affected by the work of improvement, or peculiar to it, when material, can obviously be considered for but one purpose, namely, deduction from the damages to the property. It would be absurd to say they can be added to either the value of the land taken or to the damages to the residue. The land owner is not entitled to recover for benefits conferred upon him. He cannot assert as the basis of a claim for damages that which is a benefit conferred upon him. They are to be separately considered only for the purpose of deduction from the amount he would otherwise be entitled to recover. Therefore, when benefits are excluded from the consideration of the jury in estimating the damages, it is because the land owner is entitled to them and not required to give them up by suffering an abatement of their amount from his damages: Henderson etc. R. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; Packard v. Bergenbeck R. R. Co., 54 N. J. L. 553, 25 Atl. 506; State v. Miller, 23 N. J. L. 383; Williamson v. Amwell, 28 N. J. L. 270; Swaze v. New Jersey etc. R. R. Co., 36 N. J. L. 295. Our decisions import that in estimating damages to land not taken the owner is to be charged with all benefits. They say if the market value of [422] the residue after the taking is equal to, or greater than, its value before the taking, there is no damage: Stewart v. Ohio River R. R. Co., 38 W. Va. 438, 18 S. E. 604; Blair v. City of Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341, 35 L. R. A. 852; Rowe v. Shenandoah Pulp Co., 42 W. Va. 551, 57

Am. St. Rep. 870, 26 S. E. 320; Board of Education v. Kanawha etc. Ry. Co., 44 W. Va. 71, 29 S. E. 503. Literally enforced, this rule would plainly charge the land owners with all benefits, general as well as special and peculiar. Though this proposition is asserted by many courts, it to be doubted whether it is anything more than a mere rule by which to charge the owner with peculiar benefits. The value immediately before, and the value immediately after, part of the land is taken, or the improvement made, are compared instantaneously so that no time is allowed for general appreciation in the value of property in the community between the two points of time taken for the comparison. Upon this theory there would be, in fact, but one point, an instant within which the work is deemed to have been done and the comparison made, thus necessarily limiting the benefits to those which are merely peculiar and special. The increase from prospective improvement has already entered into the value of the property before the comparison is made. This interpretation of the rule accords with the following views expressed by Chief Justice Shaw in Parks v. Boston, 15 Pick. 198: "(This proceeding for acquiring the title) 'is not, strictly speaking, an action for damages, but rather a valuation or appraisement of an encumbrance created on the plaintiff's estate for the use of the public. It is the purchase of a public easement. the consideration of which is settled by such appraisement only because the parties are unable to agree upon it. The true rule would be as in the case of other purchases, that the price is due and ought to be paid at the moment that the purchase is made when credit is not specially agreed on. And if a "pie poudre" could be called on the instant and on the spot, the true rule of justice for the public would be to pay the compensation with one hand while they apply the ax with the other; and this rule is departed from only because some time is necessary by the forms of law to conduct the inquiry.' It being quite clear, then, that the award would necessarily have been predicated of the market value of the condemned property at the time of the location, that is, of the filing of the map, there was no basis for speculation." [423] See full discussion of the subject in Matter of Department of Public Works, 53 Hun, 280, 289 et seq., 6 N. Y. Supp. 750, and the numerous authorities there cited. This is merely a suggestion in response to the intimation, conveyed by the instructions given, that the land owner is in no

case to have benefits from an improvement without paying for them. Our cases above referred to may not have such effect. Our statute mentions only peculiar benefits as proper matter of deduction.

However this may be, there is probably a difference between the rules applicable to land actually taken and land left in the hands of the owner, as regards benefits, whether general or special. Enhancement of value accruing to a residue is a benefit to the land owner; but enhancement in the value of the land taken does him no good. It benefits the railroad company or other condemnor, if anybody. To the land owner, there can be no increase of value in it immediately after taking, for it ceases to be his property. Any antecedent enhancement in view of the probable construction of the work through the community, for which the land is required, is either extinguished by the appropriation or passes, with the property, to the appropriator. This is palpably true when the whole of a tract or lot is taken. There is no residuum to which benefits can adhere. Such case presents the direct question whether the defendant or the applicant is to have the increase in value arising from the prospective construction of the proposed improvement. One or the other must take it, or it must be held that there is none or can be none. To hold that the defendant cannot have the benefit of such increase would conflict, not only with decisions of this court and the early Virginia decision, but with the great weight of authority as well. Grafton etc. R. R. Co. v. Foreman, 24 W. Va. 662, expressly holds that advantages of a general character, which may be or are derived in common by the owners of land along the line of improvements or benefits derived by the country at large, are not to be excluded from the estimate. This means that they are not to be excluded from the estimate of damages—by deducting them from the damages not to be taken away from the owner. Hence it must mean that, in the sense of not noticing them, they are to be excluded, wholly excluded, from consideration [424] in making up the estimate. That was a proceeding to take a right of way through a tract of land, by which land would be taken and a residue left affected by the improvement. The same rule was declared in Chesapeake etc. R. R. Co. v. Tyree, 7 W. Va. 693. As given in the syllabus of that case, it is obscure, but the opinion, at page 699, states it clearly. In James River etc. Co. v. Turner, 9 Leigh, 313, the court inserted the following

clear statement in the syllabus: "Held, that the advantages to be derived to the owner of the land condemned for the company's use, from the improvement, to which the charter requires the assessors to have regard, are such advantages as particularly and exclusively affect the particular tract or parcel of land whereof a portion is condemned—not advantges of a general character, which may be derived to the owner in common with the country at large from the improvement. And it seems that if the charter had provided that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large, should be set off against the actual value of the land condemned and the actual damages sustained by the owner, such a provision would have been unconstitutional." The rule thus declared was the conclusion arrived at after very thorough discussion by Judges Parker and Tucker, and has ever since been followed in Virginia: Muire v. Falconer, 10 Gratt. 12; Mitchell v. Thornton, 21 Gratt. 178. It is still the law of this state, unless qualified by Stewart v. Ohio River R. R. Co., 38 W. Va. 438, 18 S. E. 604; Blair v. City of Charleston, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341, 35 L. R. A. 352, and other late cases, as has been shown by reference to the earlier cases. If such qualification has been made, it is only in respect to deduction of benefits from the damages to the residue, when there is one, and not to any such deduction from the value of land actually taken.

This is apparent from the terms of the universal rule by which the amount of compensation for land taken is determined, namely, the market value at time of taking thereof. As to the time at which the land shall be deemed to have been taken, there is great diversity in the decisions—15 Cyc. 719—but practically all agree on the standard by which the value is to be determined: Pittsburgh etc. Ry. Co. v. Vance, 115 Pa. St. 325, 8 Atl. 764; Shenango etc. R. R. v. Braham, 79 Pa. St. 447; Low v. Railroad Co., 63 N. H. 557, 3 Atl. 739; Gregg v. Northern R. R. Co., 67 N. [425] H. 452, 41 Atl. 271; Tedens v. Sanitary Dist. of Chicago, 149 Ill. 87, 36 N. E. 1033; Brown v. Calumet Ry. Co., 125 Ill. 600, 18 N. E. 283; Tide Water Canal Co. v. Archer, 9 Gill & J. 479; Montgomery County v. Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407; Little Rock etc. Ry. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; Seattle etc. Ry. Co. v. Roeder, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac.

498; Esch v. Chicago etc. Ry. Co., 72 Wis. 229, 39 N. W. 129; Muller v. Southern Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265; Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Fremont etc. Ry. Co. v. Whalen, 11 Neb. 585, 10 N. W. 491; Missouri Pac. Ry. Co. v. Porter, 112 Mo. 361, 20 S. W. 568; Dickenson v. Fitchburg, 13 Gray, 546; Ligare v. Chicago etc. R. R. Co., 166 Ill. 249, 46 N. E. 803; Dupuis v. Chicago etc. Ry. Co., 115 Ill. 97, 3 N. E. 720; Pittsburgh etc. Ry. Co. v. Swinney, 59 Ind. 100. It must be perfectly manifest that, in every case of a projected railroad, there is an appreciation in values of real estate all along the proposed line before any condemnation proceedings are instituted, and, since the market value at or near the date of the institution of such proceeding is the measure of compensation, the enhancement due to the prospect of the construction of the railroad must have entered into the market value of the land, and the land owner obtains it because he takes the market value at that time, not at a date prior to the announcement of the intent to construct the road.

It is unnecessary, however, to rely, for this, upon mere argument from a rule of practice as a premise. Direct authority of high character, for the proposition that the land owner is entitled to general benefits arising from the prospective construction of the work for which the land is appropriated, is at hand. In Kerr v. South Park Commrs., 117 U. S. 379, 6 Sup. Ct. Rep. 801, 29 L. ed. 924, the following charge, delivered by the trial court to the jury, was approved: "A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature, which finally became a law on the —— day of February, 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto in that vicinity. Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity, or the anticipated growth and prosperity of the city of Chicago, you should take in account in determining the amount that will fairly compensate the owner." The court also approved the principles announced in Cook v. South [426] Park Commrs., 61 Ill. 115, in the syllabus of which the following is found: "In assessing the damages, the value at the time of the condemnation should be considered, the owner being entitled to the benefit of an

advance caused by the prospective establishment of a public park." These were cases in which the whole of the property was taken, just as in this case. In San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, the court refused to apply the rule, because of the peculiar character of the land and the fact that it had no market value, but admitted the soundness of the principle. Cobb v. City of Boston, 112 Mass. 181, holds that such prospective benefits enter into the market value, but that the facts as to what improvements have been made or are contemplated are not admissible as independent evidence, nor should the jury, in estimating value, treat such enhancement as an independent element of value. They must find the value at the time of the appropriation, considering, for that purpose, all proper evidence thereof, including the prospective construction of the improvement. In Cobb v. City of Boston, 112 Mass. 181, Wells, J., said: "The question to be determined in each issue was the market value of the land at the time it was taken by the city. The petitioner Cobb was not entitled to the advantages, whether real or speculative, which might result from improvements to be made by the city after taking the land. Neither the fact that such improvements were afterward made, nor that they were contemplated before the land was actually taken, was competent as independent evidence, to show what the market value was. So far as the market value was in fact affected by the knowledge of what was to be done, or of what was contemplated, the petitioner Cobb was allowed the full benefit of it. His witnesses took it into consideration in making their estimate of value, to which they testified, and were also allowed to state it as a reason for such estimate. This was all he was entitled to." Collateral or concomitant elements of value in the property are not to be separately considered in arriving at its value: In re Department of Parks, 53 Hun (N. Y.), 280, 6 N. Y. Supp. 750; Pittsburgh etc. Ry. Co. v. Swinney, 59 Ind. 100.

An inspection of instructions Nos. 1 and 2, given at the instance of the applicant, in the light of the principles just announced, will reveal their incorrectness. They, in effect, required the jury to scale down, in direct violation of law, [427] the value of the land at the time of its appropriation, by deducting therefrom the amount of such appreciation in value as had accrued by reason of the prospect of the building of the railroad through the town of Aracoma and that section

of the country. This error in the instructions is so grave in character as to call for a new trial, though it may not have prejudiced the defendants, in point of fact. Whether it did or not, it is impossible to say, but an erroneous instruction raises a presumption of injury. These two instructions are objectionable for another reason of less gravity. They misrepresent the status of the matters involved, by assuming that the road is to be constructed through the lands proceeded against. In one view the assumption accords with truth, but in another it does not. The road will not be constructed through the land as the land of the defendants, as in most cases, but through it as the applicant's land. More accurately stated, however, the fact is that the railroad takes all the land for its purposes, absorbs or consumes the use of it, and does not merely pass through it. Whether for this a new trial would be allowed it is unnecessary to say, but it is deemed expedient to observe, in view of it, that instructions should be clear and free from inconsistency.

That the market value of the land in July, 1903, is the amount to which the defendants are entitled has not been denied. For the applicant, it has been insisted that the market value does not include general enhancement in view of the probable construction of the road. But the defendants seem to think the terms "market value" have some peculiar meaning or significance which precludes the introduction of certain kinds of evidence and directs inquiry by the jury to some value other than that which, upon consideration of all the evidence bearing upon the question of value, they think is the actual value of the property. This necessitates an inquiry into the meaning and purpose of the market value rule.

The true import of the terms "market value," "actual cash market value" and "fair cash market value," which are generally regarded as convertible, is partially reflected by the nature of certain other values sometimes sought to be recovered, in view of which these terms were adopted as expressive of the standard or measure of compensation. Efforts have [428] been made to obtain the value of property in view of a particular use to which the owner has devoted it, such as mercantile trade, which cannot be permitted: San Diego etc. v. Neale, 78 Cal. 63, 67, 20 Pac. 372, 3 L. R. A. 83. Thus, in Esch v. Chicago etc. Ry., 72 Wis. 229, 39 N. W. 129, a charge that the law did not provide for compensating the owner of

the lot for losses in his business was approved. In United States v. Honolulu P. Co., 122 Fed. 581, the court said: "The compensation to be made for land taken for public use in the exercise of the right of eminent domain is measured by its market value at the time of the taking, and evidence is inadmissible to show that it has a peculiar and enhanced value to the defendant": See, also, Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; Brown v. Calumet R. R. Co., 125 Ill. 600, 18 N. E. 283; Shano v. Fifth Avenue etc. Bridge Co., 189 Pa. St. 245, 69 Pa. St. 808, 42 Atl. 128; Chicago etc. R. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. 515; Munkwitz v. Chicago etc. R. R. Co., 64 Wis. 403, 25 N. W. 438; South Omaha R. R. Co. v. Todd, 39 Neb. 818, 58 N. W. 289; In re New York etc. R. R. Co., 98 N. Y. 447. It was said in In re Furman St., 17 Wend. 649: "The use to which the owner has applied his property is of no importance beyond its influence upon the present value. If highly cultivated, it will be worth more than if suffered to run to waste. What price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals, the owner may demand any price, however exorbitant, for his property; but when it is taken for public purposes, he can only demand its real value. That value cannot depend in any degree on his own will. To allow either his judgment or his fancy, in relation to the proper use of the property, to influence the question, would be to make the estate either more or less valuable, as it might happen to be possessed by one individual or another." Another value which it would be obviously unjust to adopt is the value to the appropriator for the purpose for which it is taken, another special utility value, instead of the value for all purposes to which the property is adapted. If this were permitted, a city, town, county court, school board, or railroad company might be made to pay many times the actual value of a piece of property, indispensable to its purposes. Another kind of value guarded against by this rule is the speculative value: Muller v. Southern Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265.

The rule is founded upon the assumption that all real estate has a market value, and this is practically true, although these [429] values are not so well defined and easily ascertainable as are the market values of wheat, oats, rye, corn, hay, potatoes, bacon, beef, cattle, hogs, lumber, coal and the numerous com-

modities found in commerce. Occasionally there is an exception to this rule, owing to the peculiar nature of the property. In a few rare instances courts have said the property involved had no market value. The property of the Monongahela Navigation Company, taken by the United States, by the proceeding reported in 148 U. S. 312, 13 Sup. Ct. Rep. 622, 37 L. ed. 463, consisting of its locks and dams, franchise and right to take tolls, seems to have been so regarded and treated, since the value was determined by the use in which the property was employed, but such proceedings bear little analogy to a simple action to condemn a small piece of land. Owing to peculiarity of situation and other circumstances, sales of land may be infrequent and prices of it seldom discussed, but the value must nevertheless be determined by practically the same methods as those employed in settled communities in which sales are frequently made. For this, see San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, in which the court declared that: "When there is no current rate of price, and where in consequence the court must arrive at the value from a consideration of the uses to which the property may be put, the enhancement in value by reason of the proposed improvement cannot be considered. Such a value is too remote and speculative."

In view of what has been said on the subject of market value, it is perfectly manifest that the property involved here has a market value. All parties admit that, if offered for sale in the open market, it would bring a price. It had been sold only a short time before the application for its condemnation was made for eighteen hundred and twenty-five dollars at a public judicial sale. It clearly has that which falls within the definition of market value, namely, "the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of having it": Stewart v. Ohio Pac. R. R. Co., 38 W. Va. 438, 18 S. E. 604; Lewis on Eminent Domain, 478; Pittsburgh etc. Ry. Co. v. Vance, 115 Pa. St. 325, 8 Atl. 764; Lawrence v. Boston, 119 Mass. 126; Little Rock Ry. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792. See long list of cases cited in that most excellent new work, "Words and Phrases," volume 5, page 4383. It is equally apparent that the market value of this property, at the time it was [430] taken had not a fixed, or readily ascertainable, value, such as many kinds of personal property have,

but only a value determinable by the opinion of the jury upon consideration of all the evidence bearing on that question.

This is shown by the rules prescribed by the courts for ascertaining the value. In Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, the court held that: "In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private parties, the inquiry in such cases being, What, from their availability for valuable uses, are they worth in the market? As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." In Low v. Railroad Co., 63 N. H. 557, 3 Atl. 739, the court said: "In assessing the plaintiff's damages, the question was, What was the fair market value of the land at the time when it was taken by the defendants? In determining that question, whatever in its location, surroundings and appurtenances contributed to the availability of the land for valuable uses was proper evidence to be considered by the jury in estimating its salable character and ascertaining its market value." To the same general import, see Santa Ana v. Harlan, 99 Cal. 538; In re Department etc. Co., 53 Hun, 280, 6 N. Y. Supp. 750; Ligare v. Chicago etc. R. R. Co., 166 Ill. 263, 3 Atl. 739; Dupuis v. Chicago etc. R. R. Co., 115 Ill. 97, 3 N. E. 720; Brown v. Calumet etc. Ry. Co., 125 Ill. 600, 18 N. E. 283; Kierman v. Chicago etc. Ry. Co., 123 Ill. 188, 14 N. E. 18. Such latitude is allowed in seeking the value, that opinion evidence is freely admitted and given a wide range: Grafton etc. R. R. Co. v. Foreman, 24 W. Va. 662, 674; Beck v. Pennsylvania etc. R. R. Co., 148 Pa. St. 271, 33 Am. St. Rep. 822, 23 Atl. 900; Cochrane v. Commonwealth, 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610. On the question of value, the jury may rest the verdict largely upon their own knowledge derived from a view of the premises. Thus, in Kierman v. Chicago etc. Ry. Co., 123 Ill. 188, 14 N. E. 18, the court held as follows: "The result of a jury's personal view of the land over which a railroad is sought to be laid is evidence proper to be acted upon by them; and if they believe from the whole evidence that they have, from such view, arrived at a more accurate judgment as to the value of the premises sought to be taken and of the damages than that shown by the evidence in open [431] court, they may, upon the

evidence, rightfully fix the value of the land taken; and the damages, at the amount so approved by their judgment formed from the personal examination, even though it differed from the amount testified to, and the weight of testimony given by witnesses in open court." Whether this court would be willing to go so far as that it is unnecessary to say, but it could not repudiate the general rule that verdicts in such cases will rarely be set aside, in the absence of error in the rulings of the court. Such verdicts have a peculiar immunity from disturbance, for the very reason that the amount of compensation is so largely a matter of opinion and judgment on the part of the jury, resting in part upon the opinions of witnesses. All this clearly points to the absence of any resort to a supposed fixed market value, established by concensus of opinion in the community, or otherwise, like the value of commercial articles, for which the jury must inquire, and on which, if found, together with their knowledge of the premises derived from their view of the same, they must base their verdict, disregarding all other evidence.

As each of the three instructions proposed by the defendants contains a direction to the jury to inquire as to whether the property had a market value, and, if so, to rest the verdict on that and their view of the premises, instead of directing them to ascertain the market value of the property, using for that purpose, as evidence, the knowledge acquired by their view, and all other evidence, facts and circumstances in the case, including any market value it might have by concensus of opinion among those who were familiar with real estate values, as a mere fact in evidence to be considered with all other evidence, if, indeed, such fact is competent evidence, it being in the nature of hearsay information, I regard them as bad and as having been properly refused; but a majority of the court are of a different opinion, and think the court erred in refusing to give instructions Nos. 1 and 2. My associates fully concur in my statement of principles applicable to the subject, but differ from me in construing the instructions. They think the instructions, properly interpreted, direct the jury to ascertain, from all the evidence in the case, the value of the property, and do not hamper their action by an inquiry [432] for, and adoption of, a supposed market value other than that to be fixed by themselves.

We are of unanimous opinion, however, that instruction No. 3, requested by the defendant, was properly refused,

because it excludes the purchase price of the property from consideration as evidence. The price paid for the land, if not too remote in time, is admissible evidence in such case: In re Department etc. Co., 53 Hun, 280, 6 N. Y. Supp. 750. This property was purchased only about three months prior to the commencement of this action.

The rulings on the admission and rejection of evidence need not be noticed in detail, since they are all clearly covered by the principles above stated. One of them related to the purchase price of the property, and has been disposed of. The others may all be grouped under the objection to the competency of witnesses to testify to their opinions as to the value of the property because of lack of knowledge of the supposed market value of the land, although all of them knew the property well. One of them—J. S. Miller—had resided in the little town of five hundred inhabitants twenty-three years, still resided there, had bought the property itself three times, and had lived in the house on it for twenty-two years. W. A. De Jarnette lived two miles from the town at the time and had previously resided in it for about thirty years. Walter Cary had known the property for about fourteen years and had resided in the town about the same length of time. C. V. White had resided in the town for nearly thirty-two years. Bruce Holland lived in the town and had known the property for five years. J. Cary Alderson knew the property and had resided in the town for thirteen years. Simpson Ellis, a farmer and blacksmith, lived within three miles of the town, and had run his blacksmith-shop in it for ten years, knew the property in question and had once owned it and resided in the house on it. Nothing but the erroneous assumption of counsel for defendants as to the market value theory could have led them to urge against such witnesses the objection of incompetency. All the rulings of the court respecting this evidence were correct.

It is urged that the court erred in refusing a new trial on the application of both plaintiff and defendants, without [433] regard to the question of error in the rulings of the court or the verdict. Absence of any authority on the subject necessitates the adoption of a rule, and, in view of the discretion always accorded to trial courts concerning the matter of new trials, we hold that the exercise of such discretion, in refusing to set aside a verdict on the sole ground of a request by both

parties for such action, is not an abuse of it, and is, therefore, not reviewable. Such an application is not analogous to one for the setting aside of a consent decree, which partakes largely of the nature of a rescission of an agreement. Here there has been a full trial in which the parties have agreed to nothing, but have fought each other to the end. If a trial court were bound to grant new trials on such ground, the work of the courts might become greatly increased to the prejudice of suitors, who, never having had a trial, would be delayed by those who had had, perhaps, several. When the law has given a man one fair trial, it owes him no further duty. Illustrations of this principle are numerous.

For the error noted, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial according to law and the principles herein stated.

The Measure of Damages when land is condemned for a railroad is the market value of the property taken, together with the depreciation in value of that not taken, and those respective amounts are to be ascertained irrespective of any benefits that may result from the construction of the road: Seattle etc. Ry. Co. v. Roeder, 30 Wash. 244, 94 Am. St. Rep. 846. The market value is to be determined as it was at the time of the appropriation: Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51; Cochrane v. Commonwealth, 175 Mass. 299, 78 Am. St. Rep. 491. And the market value is its value in view of all the purposes to which the property is adapted, whether actually used for those purposes or not: Cochrane v. Commonwealth, 175 Mass. 299, 78 Am. St. Rep. 491; McKinney v. Nashville, 102 Tenn. 131, 73 Am. St. Rep. 859.

DAWSON v. DAWSON.

[57 W. Va. 520, 50 S. E. 613.]

JUDGMENT in Habeas Corpus—Res Judicata.—A judgment in habeas corpus proceedings by a wife against her husband for the custody and control of their infant child, in favor of the wife, is res judicata in a subsequent action by such husband against his wife for divorce and the custody of such child, as to all facts existing at the time of rendition of the judgment in the habeas corpus proceedings. (p. 810.)

DIVORCE—Custody of Child—Former Judgment.—In an action by a husband and against his wife for a divorce brought subsequently to habeas corpus proceedings in which the custody of their infant child was awarded to her, he must, to entitle him to have the judgment in the habeas corpus proceeding annulled and regain the custody of such child, allege facts occurring subsequently to such judgment or unknown at the time it was rendered, which, if shown to be true,

would warrant the court, in view of the welfare of the child, in awarding the custody to him. (p. 811.)

DIVORCE—Custody of Child.—If a father suing for divorce is claiming the custody of a child of the marriage, the court will exercise its discretion according to the facts and what appears to be for the best interest of the child. The welfare of the child is the controlling consideration in awarding its custody to either parent. (p. 813.)

DIVORCE—Custody of Child.—If the father and mother have separated and their infant children must of necessity be deprived of the care, protection and training of one of them, then it is the duty of the court to confide the custody of such children to that parent, whether father or mother, best suited to maintain, protect and educate them and bring them up in moral courses. (p. 814.)

Flick, Westenhaver & Noll and F. W. Brown, for the appellant.

Faulkner, Walker & Woods, for the appellee.

[521] McWHORTER, J. Charles S. Dawson and Clara B. Fearnow, were married on the 8th of April, 1896, in Morgan county, and lived together as husband and wife in said county until the fourteenth day of May, 1898, when the wife left their home and went to the home of her parents, taking with her their only child, at that time, Ray, who was born on the fifth day of December, 1896. On the 20th of October, 1898, another child was born to them, named Agnes. She remained away from home and at her parents' home ever after the time she left. On the thirty-first day of July, 1898, Charles S. Dawson went to the home of his wife's parents and took the child and started away with it before his presence was discovered. He was followed some distance by the mother, who, not being very strong, was unable to overtake him and he succeeded in getting away with it. On the first day of August she filed her petition to the judge of the circuit court of Morgan county, praying for a writ of habeas corpus, which was granted. In response to the writ the defendant made his return and brought the child into court, and on the seventeenth day of August, 1898, the court, having fully heard all the evidence offered on both sides, took time to consider and in the meantime placed the child in the custody of the petitioner, Clara B. Dawson, bond having been given for the safekeeping and production of the child in court when the same should be required. At the January term of 1899 the court awarded the care and custody of the child to the petitioner, Clara B. Dawson, until the further order [522] of

the court, and gave judgment in her favor for costs against the defendant, providing that the defendant should have access to the said Ray Dawson at any hour between 9 A. M. and 8 P. M. at any day that he might desire to see him. To which ruling of the court the defendant took exceptions and was granted leave to prepare bills of exceptions within thirty days from the adjournment of the term. No appeal or writ of error was ever taken to this judgment. On the thirtieth day of July, 1901, Charles S. Dawson sued out of the clerk's office of the circuit court of Morgan county his subpoena in chancery against Clara B. Dawson, and at the August rules, 1901, filed his bill therein alleging the marriage of the plaintiff and the defendant and the birth of the two children, Ray and Agnes, and alleging that on the 14th of May, 1898, defendant, without just cause or excuse, had willfully abandoned and deserted him, taking with her their said son Ray, and going to the home of her father in Morgan county, where she had ever since resided; that he was always true and kind to his wife, treating her with consideration and well providing for her comfort and needs; that she left his home during his absence therefrom and refused to return and resume the relations of married life with him, and also refused to give him possession of his said children, and mentioned the habeas corpus proceedings had two years before, wherein the court awarded the son of the parties, Ray Dawson, to the defendant, the mother, subject to the further orders of the said court. "Plaintiff says that he is clearly entitled to the care and custody of his said child, and that there is now no valid or just reason or cause why he be not restored to the said father's care and custody," and prayed that divorce be decreed him from the bond of matrimony on the ground of willful abandonment and desertion, and that said children, Ray Dawson and Agnes Dawson, be given into his custody, and for general relief.

The defendant appeared and filed an answer in the nature of a cross-bill praying affirmative relief. The answer denied all the allegations of the bill charging her with misconduct and alleging that she was obliged to leave plaintiff because of cruel and inhuman conduct toward her; denied that plaintiff had been true and kind to her, and had always treated her with consideration, providing well for her comfort and [523] needs, and that she willfully abandoned and deserted him and refused to live with her husband without just cause; al-

leging that the conduct of the plaintiff toward her, both before and since their separation, had been cruel and inhuman in the extreme, rendering it impossible for her to live with him, and ruining not only her happiness, but also her health; that plaintiff was a man of ungovernable and insane temper and passionate and overbearing disposition; that during the first year of their married life while they lived with respondent's parents they lived in comparative peace and happiness; that after they had moved to the farm of plaintiff's father and were living by themselves difficulties began, the first of which was because of the objection of respondent to the bringing into their home, from the almshouse, a half-witted girl of bad reputation, who was not long afterward delivered of a bastard child. In the fall of 1897 respondent's health became seriously affected, involving her lungs, she having a tendency to pulmonary trouble, which with the labors incident to the duties of a farmer's wife and the care and nursing at the breast of an infant rendered respondent in no condition, physically or mentally, to bear the insults, injuries and outrages set forth in the answer; that instead of sympathizing with respondent, plaintiff's ill-temper increased, charging that her delicacy was pretended, and that respondent's mother had put into her head the notion that she was likely to die soon, and resented her mother's solicitude as a personal affront; that in the spring of 1898 respondent undertook to discharge the household duties, nursing and caring for her child, without any hired help; finding that she was unable to do so, and that her health was giving away under the strain, she told plaintiff at breakfast, on May 13, 1898, that she would be obliged to have aid; he refused and flew into a violent passion; said he would not have a dozen in his family; that he would pay for no help; later in the day, about 11 o'clock, he returned to the house and began upbraiding respondent, who only begged him to cease; he violently asserted that he would not be run over by any woman, declaring respondent was a liar and a double-faced woman, and ordered her to leave and go to her parent's home. Fearing for her life, respondent said and did nothing, till on the next morning, when he had left the house, she then, acting
524 on his orders, left for her parent's home, where she has since resided; she left a note explaining that she had gone because of his cruel treatment and because she had been told to go; that from that day to this plaintiff had offered no explana-

tion of his conduct or withdrawn his order to go, or requested the respondent to return, but, on the contrary, his subsequent conduct had been even more cruel and insulting and inhuman; that the episode on the thirteenth day of May, 1898, was only the culmination of a series of acts of cruel and inhuman conduct. Not many months before this time, on one occasion when respondent, owing to the state of her health and worn out by nursing, begged him to excuse her from sexual intercourse, and the plaintiff in a violent rage left the bed, went to the desk where he kept his razors, declaring that he would put an end to matters and would kill himself, putting respondent in fear of serious bodily hurt, and, again under similar circumstances he acted in the same way. At another time he falsely accused respondent of having been satisfied by sexual intercourse with other men; that the excessive sexual intercourse demanded by the plaintiff and yielded to by respondent at a time when she was nursing one child at the breast and was pregnant was largely responsible for her weak and broken health, and was cruel and inhuman treatment within the meaning of the law, and any acts of respondent tending to restrain it were resented with violence; and alleges the taking of the child, Ray, from her possession by the plaintiff by stealth when respondent was seven months advanced in pregnancy, and the shock to her system nearly produced a miscarriage and placed her life in serious jeopardy, which fact was at once brought to the attention of plaintiff by Dr. Rau, the attending physician, with a request to return the child as the only remedy he could prescribe, and was necessary to her recovery, in a letter to W. M. Marston, which plaintiff admitted in his answer in the habeas corpus proceedings filed as part of exhibit No. 1 was received by him on the thirty-first day of July, a copy of which letter was filed with the answer; that notwithstanding these facts such was the violence of his disposition and the inhumanity of his conduct that he ignored the request, made no attempt to inquire into the truth of Dr. Rau's report, and refused to consider and comply with the request, preferring the gratification of his wishes or malice to
525 the life of respondent or even that of his own child; that yet while the life of respondent and plaintiff's unborn child was still in danger, plaintiff filed an answer to the habeas corpus petition in which he not only resisted the relief by cruelly and falsely charging that respondent's condition was due to her own conduct, and that she had resorted to means to

prevent the rearing of a family which were immoral in their character, which respondent was advised was not only evidence of the cruel and inhuman disposition of plaintiff, but was such cruel and inhuman treatment as would entitle her to a decree for divorce: that although the circuit court in the habeas corpus proceeding gave permission to plaintiff to visit the child, Ray, at any hour between 6 A. M. and 9 P. M., and though courteously treated whenever he did so, he only visited the said Ray four or five times after the separation, and his last visit was in December, 1898; that he never had asked to see the second child, Agnes, which to respondent was conclusive evidence that his affection for his children was much less strong than his malignant desire to inflict torture on her by taking them away from her; that as to her right to the custody of her children and her ability to provide a suitable home for them respondent adopted the allegations of her petition in the habeas corpus proceedings, and alleged that no change in her condition or the circumstances which then justified the court in awarding her the custody of said Ray had occurred to call for a new order on the subject; that plaintiff by his conduct had allowed his children to forget his existence, to become wholly weaned in their affections and recollections from him, so that his children, as well as respondent, would cruelly suffer in their affections by transfer to one whose conduct showed he had lost all affection for them, and prayed for a perpetual divorce a mensa et thoro from plaintiff, that the custody and possession of her children might not be disturbed, but if need be, confirmed, and for reasonable alimony.

A large number of depositions were taken and filed by both parties, and the cause was heard on the twentieth day of August, 1902, on the papers and proceedings theretofore read and had, and on the answer and cross-bill of defendant, and general replication thereto, and on the depositions, when the court found that defendant was not entitled to the relief
526 sought in her answer and cross-bill, and that the plaintiff was entitled to an absolute divorce from the defendant by reason of her desertion and abandonment on the 14th of May, 1898, which had continued without interruption from that time to the present, and decreed accordingly; and further, that the defendant was not entitled to any further allowance for permanent alimony or counsel fees, and decreed the custody and possession of the child, Ray, to the plaintiff until the

further order of the court, and the custody and possession of the child, Agnes, was awarded to the defendant until the further order of the court, and provided for the visiting by the parents to the children respectively at any hour between 9 A. M. and 6 P. M. as often as once a week, and leave was reserved to either party to apply to the court at any time for modification or further orders regulating the time and conditions upon which the children might be visited by them respectively in case disagreement or unpleasantness should arise by reason of the privilege given, and provided that the decree should not become absolute until the first Tuesday in January, 1903, and that the defendant was allowed until said date to return with her children to the bed and board of the husband, Charles S. Dawson, and should she so elect to return, she should be received and treated by plaintiff as his wife, and unless she should so voluntarily return within said time that the decree of divorce should be and become final, and on the sixth day of January, 1903, the cause was further heard, and no reconciliation having taken place, it was decreed that the said decree of August 20, 1902, was declared final, and plaintiff was decreed to pay all cost.

From which decrees the defendant appealed, and says that the court erred in not finding that the allegations of the defendant's answer, in the nature of a cross-bill, were sustained by the evidence, and should have granted the relief there prayed for, and should not have found that the allegations of plaintiff's bill, as to desertion and abandonment without sufficient cause, charged against the defendant were sustained by the evidence, and should not have entered the decree in his favor for absolute divorce, and should not, on a consideration of the evidence, documentary and oral, in the record have awarded the custody of the infant child, Ray, to the plaintiff, and that the custody of Ray having been tried and determined [527] by the circuit court of Morgan county in an action or proceeding at law, any application for change or modification of the judgment or order then made could only have been lawfully made to the court in that proceeding, and a court of equity had not the power to review or change that judgment in a collateral suit, and that an order having been made on a full hearing as to the custody of said Ray in an action at law, a court of equity in a subsequent suit, even if it had the power in a collateral matter, would not revise or change the order in the law proceeding, except when the

welfare of the child itself requires it in consequence of some new and substantial change of conditions subsequently taking place.

The plaintiff filed no answer or special replication to the answer of the defendant in the nature of a cross-bill, but only entered a general replication to the answer. While, as contended by the appellant's counsel that the allegations of the cross-bill are to be taken as admitted to be true by the appellee, under the statute the appellee must prove her allegations as far as the same are made for the purposes of a divorce, as the case for divorce has to be made by evidence and independent of the admissions of the defendant. The evidence in the case as to the cruelty and inhuman treatment by the appellee of appellant is very conflicting, while the evidence of the appellant supports the allegations of her bill, the defendant squarely denies the facts, and there is but little, if any, oral evidence, aside from her own, of the treatment of which she complains. It is true the cruelty and brutal treatment complained of by her is mostly of such a character as other parties could have no knowledge of it. The most damaging evidence against the appellee, on the question of cruel and inhuman treatment, is the fact of his receipt of the letter addressed by Dr. Rau, who was called to treat the appellant after she was overcome by the shock occasioned by the act of the appellee in stealthily taking possession of the child, Ray, when appellant was about seven months advanced in pregnancy, which letter called appellant's attention to the fact that both the life of his wife and that of his unborn child were placed in jeopardy by his said act, and that the return of the child was the only remedy the doctor knew of to relieve them from such danger. To this he paid no heed. [528] Many witnesses who have been about the house of the parties when they were living together testified to the uniform kind treatment of the appellee toward the appellant, and that he provided well for his wife and child. It is true several of these witnesses were his own people, while others were disinterested neighbors, in good standing. Appellant testifies that he invited appellee back to live with him, while she testified to the contrary, and claims that he ordered her to leave his home and go to her father's. It is not disputed that she had been absent from appellee's home more than three years when the suit was brought.

After a careful reading of all the evidence in the case I am not inclined to disturb the decree of the circuit court in so far as the divorce of the parties is concerned. As to the care and custody of the children, the evidence is conclusive that the circumstances of either of the parties are such as to render them capable of proper care and support of either or both of the children; the parents of both the appellant and the appellee show themselves willing and able to care for and support the children. The mother, the appellant, evidently feels and manifests a greater solicitude for the welfare of the children than the appellee, who says in his testimony, which appears to have been taken in November, 1901, that he had been to see his son, under the privilege granted him by the order of the court in the habeas corpus proceeding, quite three years before, four times in all, although the permission was that he could visit him any day he desired to see him, between 9 A. M. and 8 P. M., and it is further shown that he never inquired for nor asked to see the younger child. It is true he claims that he was not cordially received or well treated on such visits, but this is contradicted by all the members of the household who were examined as witnesses, besides some outside parties who happened there at the time of some of his visits.

It is contended by counsel for appellant that the judgment of the court in the habeas corpus proceeding of three years before was res judicata, and could only be reviewed in that same proceeding by writ of error or application for another writ, if the circumstances had so changed as to authorize it. There can be no question as to the jurisdiction of a court of law in habeas corpus proceeding to try and adjudge all questions [529] arising as to the custody, possession and control of infant children. See Mathews v. Wade, 2 W. Va. 464, wherein it is held: "The jurisdiction exists in courts to determine upon the hearing of a writ of habeas corpus who has the legal right to the custody of a minor": Rust v. Vanvacter, 9 W. Va. 600; Green v. Campbell, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; Cunningham v. Barnes, 37 W. Va. 746, 38 Am. St. Rep. 57, 67 S. E. 308; Church on Habeas Corpus, sec. 425; Armstrong v. Stone, 9 Gratt. 102. It is only when some new condition subsequent to the judgment intervenes that the matter in controversy can again be submitted to the court, and the testimony is limited to the new facts arising since the first adjudication: Mercein v. People, 25 Wend. 64; Freeman

on Judgments, sec. 324; Brooks v. Logan, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669. If it were otherwise a party could prosecute his habeas corpus to final determination; then if defeated, at once bring his suit for divorce and relitigate the same questions in his suit for divorce. In the proceedings between the parties to case at bar a full, fair trial was had, exceptions taken by the respondent in the proceeding, and leave given him to prepare bills of exception looking to an appeal or writ of error, but he failed to sue out the writ of error. Appellee's bill fails to allege any change of conditions whatever since the judgment in the habeas corpus case, and so fails to place himself in position to ask relief inconsistent with the said judgment. In section 387 of Church on Habeas Corpus, with reference to judgments in a habeas corpus case being res judicata, the rule is laid down: "The principle of res judicata is applicable to proceedings on habeas corpus inquiring into and determining the rights of conflicting claimants to the custody of minor children. The court is not, in such a case, bound to deliver a child whose custody is in controversy into the custody of any claimant, but may leave it in such custody as the welfare of the child at the time appears to require; and its order as to the custody of the child is not an 'unalterable, final judgment,' but will last until the child may have the right to nominate its own guardian, or until a material change of circumstances requires a change of custody. Until some new fact has occurred which has altered the state of the case or the relative claims of the parents or other contestants to the custody of the child in some material respect, the decision of a
530 court of competent jurisdiction on a former writ is, however, conclusive upon a subsequent application. 'The principles of public policy requiring the application of the doctrine of estoppel to judicial proceedings, in order to secure the repose of society,' says Mr. Freeman, the Tribonian of the modern law, 'are as imperatively demanded in the cases of private individuals contesting private rights under the form of proceedings on habeas corpus, as if the litigation were conducted in any other form.' Otherwise, as well stated in the opinion of Senator Paige, 'such unhappy controversies as these may endure until the entire impoverishment or the death of the parties renders further continuance impracticable. If a final adjudication upon a habeas corpus is not to be deemed res adjudicata, the consequences will be lamentable. This

favored writ will become an engine of oppression, instead of a writ of liberty.' " In the case of State v. Bechdel, 37 Minn 360, 5 Am. St. Rep. 854, 34 N. W. 334, a writ of habeas corpus was sued out by the mother to recover the custody of her infant child, which was decided against her. Afterward another writ was sued out by her, in which her husband joined with her, as relator. The court held that the judgment in the first case was a bar to the second, as no new facts were shown to have occurred subsequently, and the husband's rights were solely dependent on those of the wife; the court says: "In our judgment, in such cases both principle and considerations of public policy require the application of the doctrine of estoppel to judicial proceedings. We therefore hold that a former adjudication on the question of the right to the custody of an infant child, brought up on habeas corpus, may be pleaded as res adjudicata, and is conclusive upon the same parties: Mercien v. People, 25 Wend. 64; People v. Brady, 56 N. Y. 182; Freeman on Judgments, sec. 324; Church on Habeas Corpus, sec. 387. In this case the former adjudication pleaded in the return to the writ is admitted in the answer; and no new facts are alleged as having since occurred which alter in any material respect the rights of either party to the custody of the child": See, also, to same effect, In re Sneden, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009; Wilson v. Elliott, 96 Tex. 472, 97 Am. St. Rep. 978, 73 S. W. 946, 75 S. W. 368; 9 Am. & Eng. Dec. in Eq. 75; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672. In DuBois v. Johnson, 96 Ind. 6, the court, after quoting from Williams
531 v. Williams, 13 Ind. 523, says: "The substance of this is that courts may modify the decree awarding the custody of children in divorce cases, but such modification must be upon matters which have arisen subsequent to the decree. This commends itself to our judgment as the reasonable rule." In Carriens v. Carriens, 50 W. Va. 113, 40 S. E. 335, 53 L. R. A. 930, it is held: "A decree fixing the custody of a child upon decree in a divorce suit is final on the conditions then existing, and should not be changed afterward unless on altered conditions since the decree or on material facts then existing, but then unknown, and for the welfare of the child." And at page 18, it is said in the opinion: "Considerations just stated would justify us in saying that the mother is entitled to the custody of Walter Carriens; but they are by no means all

that is to be considered, for there stands the first decree adjudging to the mother his custody, which must remain strong between the mother and father. If the question were for the first time before us, we might give his custody to the father. I hardly think we ought; but that question has been litigated, and the second decree is only a reversal of the first without adequate cause. Wherever a power is given by statute to order a decree as to custody or alimony, the former decree has such force that it will not be reviewed on facts existing at its date, but will be altered only on changed circumstances, or as to custody of children on material facts unknown at the date of the decree showing that the welfare of the children demands a change. No such circumstances have been shown in this case, and we see no reason for reversing the first decree as to this matter: Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652, and note; 2 Am. & Eng. Ency of Law, 2d ed., 137. Section 11 allows the change only for the benefit of the children." It will be seen that the same rule applies in cases of decrees entered in divorce cases under section 11, chapter 64 of the Code, and the decree will be altered only on facts occurring subsequent to the entering of the decree, not on those existing at the date of the decree, unless then unknown, and even under said section the change would only be made for the benefit of the child, and not out of regard for any legal rights of the father. A petition for a new writ of habeas corpus or a petition to revise a decree entered in a divorce suit should show the new facts which are relied upon [532] by the petitioner to entitle him to a different decision, such facts occurring since the judgment or decree, or the unknown facts at the time of the entering of the judgment or decree must be set forth in the petition and must be sufficient in law to call for a new and different order as to the custody of the child, otherwise the petitioner would not be entitled to relief. In case at bar the bill of the appellee sets out no new facts to entitle him to relief against the order awarding the custody of the child, Ray, to the appellant. There is nothing in the bill, whatever, which tends to show that the welfare of the child, Ray, demands a change of custody. The same rule applies in divorce as in other cases, that the plaintiff can have no relief unless the allegations of his bill entitle him to it. In Handlan v. Handlan, 37 W. Va. 486, 16 S. E. 597, it is held: "In suits for divorce, as well as in

suits in equity, in general all orders and decrees must be justified by the pleadings, as well as by the proofs": Wass v. Wass, 41 W. Va. 126, 23 S. E. 537.

Appellee assigns as cross-error the action of the court in decreeing the custody of his infant daughter, Agnes, to the appellant. In his bill he relies solely upon his legal rights at common law. After simply referring in his bill to the habeas corpus proceedings in merely an incidental manner and alleging that he is clearly entitled to the care and custody of his child, Ray, and that there was no valid or just reason or cause why he should not be restored to his custody, prays "That said children, Ray Dawson and Agnes Dawson, be given into the care and custody of their said father, the said plaintiff." In support of this cross-assignment of error, it is argued by counsel for appellee that at the date of the decree awarding the child, Agnes, to her mother, she was four years of age, and there was not a particle of evidence in the record to show that she was in need of her mother's care; that her father had the legal right to her custody and control, and that his right thereto was not to be defeated by sentimental considerations and subjected to any compromise with his wife, and cite Carr v. Carr, 22 Gratt. 168, and Latham v. Latham, 30 Gratt. 307. Appellee gives no other reason that the said child, or either of the children, should be placed in his custody except the cold legal fact that he was their father and entitled under the common law to such custody, and as said by
533 counsel for appellee in their brief, the mother "had no right to the possession of the child." The evidence shows that appellee had never manifested any interest whatever in the child, Agnes, and very little, if any, in his son, Ray; in making his visits to Ray, under the judgment of the court in the habeas corpus proceedings, he never inquired after the younger child, and there is no evidence that he ever saw her more than once, and it does not appear that he paid any particular attention to it. He admits himself that he never made more than four visits to his son after the court gave him permission to visit him, the last of which visits was in December, 1898, nearly three years before the institution of this suit. From his conduct it would appear that he felt very little interest in the children, or either of them, and cared but little for their welfare; he could not feel the same interest in the children that his wife feels, who from the evidence and the intelligent deposition given by herself is

proven to be a woman of, at least, fair education and more than ordinary culture, and who has all these years bestowed upon them the watchful and loving care of a fond and devoted mother. Even in the thirty years which have transpired since the decision in the Carr v. Carr case, cited by counsel for appellee, the rule touching the custody of children has been greatly modified in harmony with our advanced civilization. In March, 1902, in the case of Meyer v. Meyer, 100 Va. 228, 40 S. E. 1038, it is held: "Ordinarily, the father is entitled to the care and custody of his infant child, but, when the father is claiming the custody of the child, the court will exercise its discretion according to the facts and what appears to be the best interest of the child. The welfare of the child is the controlling consideration." The opinion in that case refers to the case of Stringfellow v. Summerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623, with approval, and also to the case of Carriens v. Carriens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930, from which it quotes with approval. In 9 American and English Encyclopedia of Law, second edition, 867, it is said: "In selecting a custodian the courts are free in the exercise of sound discretion to promote the welfare of the children, and are not bound to recognize the paramount right which the father had at common law to the custody of his children. The welfare of the children and the protection of their interests are the matters of primary consideration with the courts," and authorities there cited. [534] In case of Carriens v. Carriens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930, the opinion, written by Judge Brannon, in referring to the common-law rule, says: "The law as to the custody of the children has been greatly modified. Formerly the right of the father to its custody was almost an inflexible rule. That rule forgot that a mother had a heart. The real owner of the child, be it even a baby, must give it up. But civilization, advanced thought and human kindness have bent this iron rule and opened the ears of courts to the pleading of the true friend and owner of the child. The courts do not, these days, inexorably take from mothers their children of tender years, even for the father, if the mother is a fit person and has a home for them, but look at all the circumstances. The welfare of the child is the test." According to the best modern authorities the welfare and highest interest of the child are of primary importance, and must be consulted in deciding as to its custody and control: Bonnett v. Bonnett, 61 Iowa, 193,

47 Am. Rep. 810, 16 N. W. 91. And in note to Brooks v. Logan, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669, it is said: "Where the father and mother have separated, and their infant children must of necessity be deprived of the care, protection and training of one of them, then it is the duty of the courts to confide the custody of the infants to that parent, whether father or mother, best suited to maintain, protect and educate them and bring them up in moral courses": Citing McKim v. McKim, 12 R. I. 462, 34 Am. Rep. 694; Goodrich v. Goodrich, 44 Ala. 670; and all this is strictly consistent with our statute as found in section 11, chapter 64 of the Code, and authorized thereby.

The court did not err in giving the custody of the younger child to the appellant.

For the reasons herein stated the decree of the circuit court of Morgan county is reversed, only in so far as it gives to the appellee care and custody of the child, Ray Dawson, and in all other respects the decree is affirmed.

A Decision on Habeas Corpus respecting the custody of an infant is generally considered conclusive on a subsequent application for the writ, unless same new fact has occurred which alters the status of the case: In re Sneden, 105 Mich. 61, 55 Am. St Rep. 435; State v. Bechdel, 37 Minn. 360, 5 Am. St. Rep. 854. Compare, however, the case of In re King, 66 Kan. 695, 97 Am. St. Rep. 399, where it is held that, notwithstanding the determination in a previous proceeding by habeas corpus of the right to the custody of a child, another court may make a different order respecting the custody, if satisfied that the interests of the child require, although no material change in the circumstances is shown. The validity of a decree of adoption litigated and determined in a habeas corpus proceeding is res gestae in a subsequent proceeding between the same parties to vacate such decree of adoption: In re Clifford, 37 Wash. 460, 107 Am. St. Rep. 819.

McWHORTER v. DORR.

[57 W. Va. 608, 50 S. E. 838.]

PROHIBITION.—The writ of prohibition lies only against judicial tribunals and against judicial action. (p. 816.)

PROHIBITION—Election Contest.—The writ of prohibition does not lie to prevent a member of a special and subordinate legislative tribunal, not a part of the judicial department, from acting in the hearing and determination of an election contest. (p. 820.)

W. W. Brannon, W. G. Bennett and L. H. Kelly, for the petitioner.

A. Dulin, for the respondents.

608 COX, J. This is a petition in prohibition by J. C. McWhorter, recusing C. P. Dorr, a member of a special tribunal constituted by authority of section 15 of chapter 6 of the Code, to hear and determine a contest as to the election of a judge of the twelfth judicial circuit of West Virginia (which election was held on the eighth day of November, 1904), and praying for a writ of prohibition against Dorr, preventing him from acting as a member of such tribunal. The petition alleges in effect that J. C. McWhorter and J. B. Morrison were opposing candidates for judge of said circuit at said election; that McWhorter received a majority of the votes cast in said circuit; that within the time prescribed by law Morrison gave notice of contest; that within the time prescribed by law McWhorter gave a return notice; that Morrison filed before the governor a petition; that a special tribunal under section 15 of chapter 6 of the Code was constituted by the selection of Honorable C. P. Dorr by Morrison, Honorable 609 C. W. Dailey by McWhorter, and Honorable T. P. Jacobs by the governor; that the time and place of meeting were appointed; that said tribunal has not acted in the hearing and determination of such contest; that petitioner appeared before said tribunal and objected to Dorr acting as a member thereof upon the ground that Dorr was attorney for Morrison in said contest, and that he had been attorney and counsel for Morrison in the preparation of the notice of contest; and on the ground that Dorr was a partisan of Morrison; and that Dorr, as a member of such tribunal, would be obliged to pass upon evidence involving his actions and relations with Morrison preceding and subsequent to said

election, and upon other grounds fully set out in the petition, all of which grounds are relied on here.

This court has original jurisdiction in cases of prohibition. The writ goes against a judicial tribunal and against judicial action: Norfolk etc. Ry. Co. v. Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414. The writ lies to restrain a judge of a court from proceeding in a cause in which he is disqualified by reason of interest: Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238.

The first question presented is, whether or not a special tribunal constituted under section 15 of chapter 6 of the Code is a court and part of the judicial department of the state. If it is not, prohibition does not lie. It is contended by petitioner that such special tribunal is an inferior judicial tribunal within the meaning of section 1 of article 8 of the constitution, which provides that: "The judicial power of the state shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace"

Section 11 of article 4 of the constitution provides: "The legis'ature shall prescribe the manner of conducting and making returns of elections and of determining contested elections; and shall pass such laws as may be necessary and proper to prevent intimidation, disorder or violence at the polls, and corruption or fraud in voting, counting the votes, ascertaining or declaring the result, or fraud in any manner upon the ballot."

Under this section, the legislature has power to confer upon the courts, or upon quasi judicial tribunals, or upon [610] inferior legislative tribunals, or may itself retain jurisdiction to hear and determine election contests. Where jurisdiction to hear and determine election contests has been conferred upon the courts or other permanent tribunals of the state, all rights of appeal from or review of the action of such courts or permanent tribunals, existing at common law or conferred by statute as to other matters determined by such courts or permanent tribunals, follow and apply to election contests determined by them. Such is the force and effect of our decisions: See Cunningham v. Squires, 2 W. Va. 422, 98 Am. Dec. 770, allowing certiorari from the decision of the board of supervisors under the old constitution; the cases of Dryden v. Swinburn, 15 W. Va. 234, and Swinburn v. Smith, 15 W. Va. 483, allowing certiorari from the decision of the

county court under the new constitution; and State v. McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343, allowing certiorari from action of a municipal council under section 2 of chapter 110 of the Code.

Where the jurisdiction to hear and determine an election contest has been conferred upon the legislative branch of the government, the courts have no power to review its action: Goff v. Wilson, 32 W. Va. 393, 9 S. E. 26, 3 L. R. A. 58, and cases there cited. Many others might be cited. These cases, however, aid us but little in determining the character and nature of the special tribunal authorized by section 15 of chapter 6 of the Code.

Mr. Paine in his work on Elections, section 793, says: "In the absence of constitutional inhibitions, the legislature has power to declare the certificate of election conclusive, in all cases. It may or may not authorize a contest. If a contest be authorized, the mode of contest and of trial will rest absolutely in the legislative discretion. The legislature has full power to determine what tribunal shall hear and determine the contest, and may confer the jurisdiction upon one of the ordinary judicial tribunals or upon a judge thereof, or upon any other officer, and may or may not authorize a trial by jury."

There is abundant authority holding that, primarily, elections belong to the political branch of the government, and are beyond the control of the judicial power, except when authorized by constitution or statute: 15 Cyc. 394; Caldwell 611 v. Barrett, 73 Ga. 604; Dickey v. Reed, 78 Ill. 261; Clarke v. Rogers, 81 Ky. 43; State v. Second Judicial Dist. Ct., 13 La. Ann. 89; Williamson v. Lane, 52 Tex. 335.

"In the absence of special statutory authority, the courts are without jurisdiction retione materie to entertain cases of contested elections": 15 Cyc. 394, note 66; and Construction Co. v. Police Jury, 44 La. Ann. 863, 11 South. 236; State v. Police Jury, 41 La. Ann. 846, 6 South. 774; State v. Judges Civil Dist. Ct., 40 La. Ann. 598, 4 South. 482; Fowler v. Gable, 3 Pa. Dist. 23.

"It has been held that where a specific mode of contesting elections has been provided by statute that mode alone can be resorted to; and that where a mode of contest has been provided in a city charter for contesting the election of city officers, before a statutory tribunal, it excludes any other

remedy and takes from the courts all supervisory power over such contest": 15 Cyc. 395, and the many authorities cited in notes 74 and 75.

The language of section 15 of chapter 6 of the Code, authorizing the special tribunal in question, is as follows: "Where the election of treasurer, auditor, state superintendent of free schools, attorney general, a judge of the supreme court of appeals or a circuit court, is contested, the case shall be heard and decided by a special court constituted as follows: The person declared elected shall select one, the contestant another, the governor a third person, who shall preside in said court, and the three, or any two of them, shall meet at a time and place to be appointed by the governor, and being first duly sworn impartially to decide according to law and the truth upon the petition, returns and evidence to be submitted to them, shall proceed to hear and determine the case and certify their decision thereon to the governor. They shall be entitled to the same pay and mileage as members of the legislature to be paid out of the treasury of the state." Section 14 of the same chapter provides, pursuant to section 3 of article 7 of the constitution, that a contest as to the election of a governor shall be determined by the legislature, both houses sitting in joint session. By section 13 of the same chapter, it is provided both in relation to a contest as to the election of a governor before the legislature and as to a contest as to the election of the other officers mentioned above before a special tribunal authorized by said section 15, as follows: [612] "The depositions shall be transmitted to the clerk of the house of delegates, to be delivered by him to the joint committee or special court hereinafter provided for. In other respects the regulations contained in this chapter respecting contests for a seat in the legislature shall be observed so far as they are applicable."

The formation of the special tribunal under said section 15 is peculiar and unusual in the formation of judicial tribunals. Such special tribunal is constituted for the sole purpose of hearing a single election contest. It has no other or further jurisdiction except to award costs and certify its decision to the governor. The proceedings before such tribunal are strictly statutory, and in most respects, the regulations applicable to a contest for a seat in the legislature, apply to the proceedings before such special tribunal. The pay and mileage of the members of the tribunal are the same as the pay

and mileage of members of the legislature. No appeal from or review of the decision of this tribunal is provided for by statute. It must be presumed that the legislature had these things in mind when it authorized such a tribunal. The fact that no appeal or review is provided for cannot be attributed to an oversight or inadvertence by the legislature. It was competent for the legislature, under section 11 of article 4 of the constitution to provide a special tribunal, legislative in its character, to hear and determine contests as to the election of the officers named, wholly separate from the judicial power of the state and not reviewable by it—a special tribunal at once exclusive and conclusive. It seems clear to us that the special tribunal in question is such a tribunal. No doubt the legislature was impelled to create such a tribunal upon important considerations affecting the public welfare. The officers named are treasurer, auditor, state superintendent of free schools, attorney general and judges of the supreme and circuit courts. The public good requires that a contest for these offices shall be settled finally without delay. The necessity is urgent that contests as to who shall adjudicate the questions of life, liberty and property within the state, and as to who shall administer the affairs of the state, shall be determined at the earliest possible moment and shall not be the subject of tedious and protracted litigation in the courts. The right to hold the offices named should not long 613 be in jeopardy. A contest as to the election of governor is to be determined by the legislature without review or appeal. It appears to us that the legislature intended the same finality to follow the action of the special tribunal authorized by section 15, chapter 6. The legislature, in order to relieve itself from the burden of hearing and determining contests as to the election of the officers mentioned in said section 15, and in order to relieve the people of the state from the great cost of maintaining a legislature to hear and determine such contests, authorized by said section 15 a special and subordinate legislative tribunal to act in its stead and place.

It may be said that said section 15 calls this special tribunal a court, and that such tribunal exercises judicial functions and is therefore a part of the judicial power of the state. The reply is that it may be said with equal force that the legislature in determining a contest for governor exercises judicial functions; and that a circuit court exercises

judicial functions when it incorporates a city, town or village. Yet the circuit court, when so acting, is held in Re Town of Union Mines, 39 W. Va. 179, 19 S. E. 398, to be but a subordinate branch or tribunal of the legislature, not of the judicial department, and as such not subject to the appellate jurisdiction of the supreme court of appeals. Judge Dent, in delivering the opinion of the court in that case, quotes with approval Ordronaux on Constitutional Law, 344: "Under the tripartite division of the powers of government, it becomes the duty of the legislature to enact laws, of the judiciary to construe them and of the executive to enforce them," and further says: "While this is the basic principle underlying the separation of the government into its departments, it has been found to be wholly impracticable to make such separation perfect. On the contrary, it has been found necessary for its own existence and the proper discharge of its functions that the legislature should exercise both judicial and executive or administrative functions, such as are entirely distinct from a legislative or law-making function, strictly speaking. In the enactment of every law the legislature is called upon to exercise judicial functions, and especially is this true in granting a charter to a city, town or village; for there must be an inquiry judicial in its nature as to whether the facts [614] justify the enactment of the law": See, also, Mackin v. County Court, 38 W. Va. 338, 18 S. E. 632.

In the case of Summers County v. Monroe County, 43 W. Va. 207, 27 S. E. 307, it is held that the action of the circuit court in appointing commissioners to settle lines between counties, under the statute, is legislative, or administrative. On page 210 Judge Brannon, delivering the opinion of the court, says: "There is another reason why this court has no jurisdiction, and that is that the action of the circuit court in this matter is legislative, or, rather, administrative of a legislative power or function, not judicial action, because the formation of counties and the fixing and altering of their boundaries is purely a legislative function. The legislature can delegate that power to subordinate agencies": See, also, Roby v. Shepperd, 42 W. Va. 286, 26 S. E. 278.

Being of the opinion that the special tribunal authorized by section 15, chapter 6 of the Code is a subordinate legislative tribunal, the writ of prohibition must be refused.

Writs of Prohibition are discussed at length in the monographic note to State v. Superior Court, 40 Wash. 555, 111 Am. St. Rep. 000.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

GALLAGHER v. McKEAGUE.

[125 Wis. 116, 103 N. W. 233.]

WILLS—Construction.—Whenever the words of a will, fairly construed, are such as to carry the whole estate, it will be presumed that the testator intended to dispose of all his property and not to die intestate as to any part of it; but the intention to pass the whole estate must be expressed in some form, and such presumption will not prevail when the language of the will, fairly construed, is insufficient to carry the whole estate. (p. 822.)

WILLS—Construction—"Effects."—If a testator in the disposing part of his will enumerates particular kinds of chattels, such as household goods, and couples with them the words "and effects," or equivalent words, the generality of his expression is to be restricted to such species of property as are ejusdem generis with the particular words. (p. 823.)

J. J. Wood, Jr., for the appellants.

E. F. Kileen, guardian ad litem, and P. Niskern, for the respondents.

118 CASSODAY, C. J. It is claimed by the appellants that the trial court improperly held that the testator died intestate as to a large portion of his personal estate. This contention is based upon the arrangement of the provisions of the will as well as the language employed. The testator specifically devised all of his real estate as mentioned in the foregoing statement. By the first clause of the will the testator devised to the appellants the house and lot then occupied by him, together with the barn thereto belonging. His moneys, notes, certificates, contracts and personal property were all in his possession on the premises when he executed the will and when he died. He also made eight specific bequests out of his personal estate, to the aggregate amount of nearly fifteen hundred dollars. And finally, by the tenth clause of

the will, he bequeathed to the appellants "all the household furniture and effects." It is conceded that the question for determination is whether "the word 'effects' is to be given the significance to which it is entitled when standing alone, or whether such meaning is colored or cut down by association with the word 'household' in the same clause." Counsel invokes the well-established [119] rule that no intention of the testator to die intestate as to a part of his estate can be presumed when his words, as found in his will, can fairly be construed to dispose of his whole estate; that whenever the words of a will, fairly construed, are such as to carry the whole estate, it will be presumed that the testator intended to dispose of all his property: Schouler on Wills, 3d ed., sec. 490; Ferry's Appeal, 102 Pa. St. 207; Miller's Appeal, 113 Pa. St. 459, 6 Atl. 715; Woodside's Estate, 188 Pa. St. 45, 41 Atl. 475; Vernon v. Vernon, 53 N. Y. 351; Given v. Hilton, 95 U. S. 591, 21 L. ed. 458; Taubenhan v. Dunz, 125 Ill. 524, 17 N. E. 456; Saxton v. Webber, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509; In re Donges' Estate, 103 Wis. 497, 501, 74 Am. St. Rep. 885, 79 N. W. 786. The language of the will in question is not in the form of a residuary bequest, nor such as necessarily to imply an intention on the part of the testator to dispose of his whole estate, as is frequently the case. In re Bagot, Paton v. Ormerod, L. R. 3 Ch. D. 348; Miner's Will, 146 N. Y. 121, 40 N. E. 788; Lawrence v. Barber, 116 Wis. 294, 93 N. W. 30. True, no particular form of expression is necessary to constitute such residuary bequest, but the intention to pass the whole estate must be expressed in some form. We find no case where the presumption against intestacy has prevailed when the language of the will, fairly construed, is insufficient to carry the whole estate. True, as urged by counsel, the word "effects" is of very general significance, and by all the authorities is equivalent, at least, to personal property, which is the only kind of property here involved. In addition to the authorities cited by counsel, see Century Dictionary; Bouvier's Law Dictionary; 3 Words and Phrases, 2320-2323; Schouler on Wills, 3d ed., sec. 509. As stated in one of the adjudications cited, "The words 'personal effects,' in a will, when not restricted by the context, mean everything embraced within the description 'personal property' ": Ewing's Appeal, 159 Pa. St. 212, 28 Atl. 186.

[120] But here the word "effects" is not used in a general or unlimited sense. If it were to be here so construed it would

include all the personal estate, and hence would be repugnant to the fifth, sixth, seventh, eighth, and ninth clauses of the will, which contain the eight specific bequests mentioned. It certainly was not intended to be used in a general and unrestricted sense in the clause in question. As here used it is expressly restricted to "all the household furniture and effects." The word "household" naturally and necessarily qualifies the word "effects" as much as it does the word "furniture." An English case, decided a hundred years ago by the distinguished Sir William Grant, is directly in point: Rawlings v. Jennings, 13 Ves. Jr. 39. In that case the testator, after making a certain bequest to his wife in his will, added this clause: "together with all my household furniture and effects of what nature or kind soever that I may be possessed of at the time of my decease." In deciding the case the learned master of the rolls said: "The second question arises upon the widow's claim of the whole residue of the personal estate as passing to her under the general word 'effect.' That claim cannot be sustained. Part of his property being particularly given to her afterward, the word 'effects' must receive a more limited interpretation, and must be confined to articles ejusdem generis with those specified in the preceding part of the sentence, viz., household furniture."

Two years afterward the lord chancellor referred to that case as having settled in that court "the doctrine" that the words "other effects," as thus used, "in general mean effects ejusdem generis": Hotham v. Sutton, 15 Ves. Jr. 320. While such doctrine is conceded, the facts are distinguished in Parker v. Marchant, 1 Younge & C. 290; Rex v. George, L. R. 4 Ch. D. 435; In re Londesborough, Bridgeman v. Fitzgerald, 50 L. J. Ch. 9. The doctrine of Rawlings v. Jennings, 13 Ves. Jr. 39, has been expressly sanctioned in a late case in Pennsylvania, wherein it [121] is held that "when a testator enumerates particular kinds of chattels, and couples with them the word 'effects,' or equivalent words, the generality of his expression is to be restricted to such species of property as are ejusdem generis with the particular word": Reakert's Appeal, 173 Pa. St. 368, 34 Atl. 58. That case was followed in the later case in that state, in which it was held that, "where a residuary clause is omitted in a will, it is neither necessary nor proper to give the residue to some specific legatee upon a forced construction of words which

do not indicate such a purpose in the mind of the testator": Becker's Appeal, 183 Pa. St. 641, 38 Atl. 1086. Of course, the rule ejusdem generis ordinarily limits the meaning of general words to things of the same class as those enumerated under them: 3 Words and Phrases, 2328, and cases there cited. We must hold that the words "and effects," as used in the will in question, are limited to household effects, as held by the trial court.

By the COURT. The judgment of the circuit court is affirmed.

In the Construction of doubtful or inconsistent clauses in a will, that interpretation should be adopted, if possible, which avoids an intestacy: Phillips' Estate, 205 Pa. St. 504, 97 Am. St. Rep. 743, and cases cited in the cross-reference note thereto.

STATE v. HOUSER.

[125 Wis. 256, 104 N. W. 77.]

CONSTITUTIONAL LAW—Appropriations—Private Purpose.—A statute appropriating the public money of the state for a private purpose and to pay a private debt is unconstitutional. (p. 826.)

CONSTITUTIONAL LAW—Appropriation—Private Purpose.—A statute appropriating public money to a person who has furnished material to a contractor for a public building who has been paid by the state, but who has become insolvent before paying for such material, is unconstitutional. (p. 827.)

L. M. Sturdevant, attorney general, for the state.

Chynoweth & Mason, for the respondents.

259 CASSODAY, C. J. 1. The question for determination is whether the legislature had power to make the appropriations mentioned in the chapter of the statute cited: Laws 1903, c. 337. The attorney general contends that the act is void upon either of two grounds. The first is that it is in violation of the provision of the constitution which declares that "the legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into": Const., sec. 26, art. 4. The case made certainly does not come within the letter of such prohibition, since neither of the relators was the "public officer, agent, servant, or contractor" of the estate. Mr. Bentley was the only person entering into any contract with the state, or who

placed himself under any obligation to the state, or who had any contract relation with the state. The relators were each subcontractors under Mr. Bentley, and to him alone were they answerable. Counsel for the relators state in their brief that "the subcontractor was agent under the contractor to do the work for the state." If this were true there would be much force in the claim of the attorney general that the appropriation was expressly prohibited by the provision of the constitution quoted, or at least that it was within the spirit of that prohibition and the mischief thereby sought to be prevented. But the view we have taken of this case makes it unnecessary to determine that question.

2. The second ground upon which the attorney general claims that the appropriations are unconstitutional is that they were not either of them made for a public purpose, but that each was made for a private purpose. It must be conceded [260] that the State Historical Library building, in the erection and construction of which the materials furnished and delivered by the relators were actually used, was a public institution. It appears that the state entered into a contract with Mr. Bentley for the erection and construction of a portion of that building. That contract required him to furnish the materials and perform the labor. In making that contract the state did not require Mr. Bentley to give any bond or security for the payment of claims of subcontractors or others who furnished materials for or performed labor in or upon the building. It is conceded that Mr. Bentley fully performed his contract, and that the state paid him in full for all the work and materials covered by his contract. The state was only concerned in having its contract with Mr. Bentley performed, and when it was so performed and paid for the public purpose of that contract was satisfied. The state made no contract with the relators, or either of them, and had no dealings with them, or either of them. It was no concern of the state, nor of the people of the state, nor of the public, whether Mr. Bentley procured such stone, crushed stone, and brick from the relators or some one else; nor whether he paid for them on delivery or obtained them on credit. In no event was the state liable for such material so furnished by the relators. This is conceded. The contracts for such materials between Mr. Bentley and the relators, respectively, were personal and private contracts. Stripped of all verbiage, the act in question was merely an

attempt to donate from the public treasury the amounts therein mentioned to the private persons therein named in payment of Mr. Bentley's private indebtedness to them. Its only purpose was to pay the indebtedness of one private person who had failed in business to the other private persons therein named. In other words, the purpose of the act was to appropriate the public moneys of the state to the payment of private debts. The question recurs [261] whether the legislature had the power to make such contributions from the public treasury to pay such private debts. Certainly the power of the legislature to appropriate moneys out of the public treasury is not unlimited. "It can only be so appropriated 'by law,' and that means a valid law": Const., sec. 2, art. 8; State v. Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1057. "No construction is permissible which defeats the obvious purpose and object of constitutional restrictions": Id. In the case last cited it is said by way of quotation from standard text-writers: "The power of the government to embark in enterprises of public charity and benefit can only be limited by the restrictions upon the power of taxation, and to that extent alone can these subjects in American law be said to fall within the police power of the state. It is implied in all definitions of taxation that taxes can be levied for public purposes only. It may be regarded as a settled doctrine of American law that no tax can be authorized by the legislature for any purpose which is essentially private; or, to state the proposition in other words, for any but a public purpose": Id.

It was held by this court forty years ago, in the language of Chief Justice Dixon, that: "The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose It cannot, in the form of a tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute": Brodhead v. Milwaukee, 19 Wis. 624, 652, 88 Am. Dec. 711.

In a later case Chief Justice Ryan said: "Taxation is the absolute conversion of private property to public use; and its validity rests on the use": Attorney General v. City of Eau Claire, 37 Wis. 400, 438. But it is unnecessary to cite

authorities to propositions [262] which have repeatedly been sanctioned by this court, and from which this court has recently and repeatedly drawn the conclusion that no appropriation can be made and no tax can be levied for a mere private purpose: Wisconsin Keely Inst. Co. v. Milwaukee Co., 95 Wis. 153, 60 Am. St. Rep. 105, 70 N. W. 68, 36 L. R. A. 55, and cases cited, particularly Lowell v. City of Boston. 111 Mass. 454, 15 Am. Rep. 39; State v. Osawkee Tp., 14 Kan. 418, 19 Am. Rep. 99; Wisconsin Ind. School v. Clark Co., 103 Wis. 651, 79 N. W. 422; Putney Bros. Co. v. Milwaukee Co., 108 Wis. 554, 84 N. W. 822; State v. Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, and cases there cited; State v. Froehlich, 118 Wis. 129, 99 Am. St. Rep. 985, 94 N. W. 50, 61 L. R. A. 345, and cases there cited. As already indicated, the appropriations in question were purely for private purposes and hence were unconstitutional and void.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the relation.

The Legislature cannot direct a municipality to pay a street contractor a specified sum where he has done work for which he is unable to obtain compensation because of errors and irregularities on the part of the municipal officers, under a constitution which forbids the gift of public money by the legislature: Conlin v. Board of Supervisors, 99 Cal. 17, 37 Am. St. Rep. 17. See, further, State v. Froehlich, 118 Wis. 129, 99 Am. St. Rep. 985, and cases cited in the cross-reference note thereto; In re Borup, 182 N. Y. 222, 103 Am. St. Rep. 796.

CHARMLEY v. CHARMLEY.

[125 Wis. 297, 103 N. W. 1106.]

APPEAL AND ERROR—Waiver of Objections.—The submission to a trial on the merits waives all defects not prior thereto brought to the attention of the circuit court and duly insisted upon. (p. 829.)

APPEAL AND ERROR—Delay in Filing Undertaking.—Under a statute providing that any person aggrieved by a decision of a county court may appeal therefrom to a circuit court by filing a notice thereof with such county court within sixty days from the date of the act appealed from, together with an undertaking thereon, if the notice of appeal is filed in time, the fact that the undertaking is not filed with the notice is not a fatal defect, although it is not filed within the time limited for the taking of the appeal. The filing of such undertaking afterward will perfect the appeal. (p. 830.)

ACTIONS—Nature of.—A claim filed in a county court by a widow against her deceased husband's estate for money alleged to have been loaned him is in the nature of an action to recover upon a contract, and not upon an equitable right of subrogation. (p. 830.)

ACTIONS—Amendment.—It is not permissible to entirely change the nature of a cause of action by amendment, as substituting one in equity for one at law, or one in contract for one sounding in tort. (p. 831.)

ACTIONS—Amendment Changing Cause of Action.—If a widow files a claim against her husband's estate for money alleged to have been loaned him to pay a mortgage on their homestead, it is error for the circuit court on an appeal from the county court disallowing the claim to permit a change in the nature of the cause of action by amendment to conform to the proof, so as to state a cause of action for subrogation to the rights of the mortgagee. (p. 831.)

SUBROGATION—Nature of Remedy.—If one is compelled to pay a debt for which he is not personally liable in order to protect his interest in the property upon which such debt is a charge superior to such interest, he thereby becomes equitably entitled to have the prior lien preserved and enforced, so far as necessary for his protection against loss. (p. 832.)

SUBROGATION is Wholly a creature of equity and exists entirely independent of contract relations. (p. 832.)

SUBROGATION—Payment of Lien.—If a person pays off a lien claim on property for which he is not, but another is liable, so that such other would derive the benefit thereof, if his interest in the property were entirely relieved from such lien, and such person acts in the matter, not as a mere volunteer, but to protect his own interest in the property, such interest being either legal or equitable, present or contingent, equity immediately operates in favor of such person by preserving such lien claim to him with the same right to enforce it as the original owner possessed, to the extent that such person would otherwise suffer loss to such other's gain. (p. 832.)

SUBROGATION—When not Applicable.—If a person paying off a lien on property is secondarily liable for the debt, there springs out of the transaction an implied promise by the one primarily liable to repay the money, and such promise does not rest on the law of subrogation, but is enforceable as a legal liability. (p. 832.)

HOMESTEADS—Subrogation to Mortgage.—The principles of subrogation apply where a married woman, having an interest in a homestead, the title to which is in her husband, and which is encumbered by a mortgage to secure his debt, without request by him, but solely to protect her homestead right, pays off the encumbrance. (p. 833.)

HUSBAND AND WIFE—Limitation of Actions.—Although the statute of limitations does not run against causes of action growing out of transactions between husband and wife, this rule does not extend to a cause of action not so arising and against which such statute commenced to run before the husband and wife became adversaries in respect thereto. (p. 834.)

SUBROGATION—Statute of Limitations.—If there is merely the right of subrogation to an interest in property, not incident to any legal right, the statute of limitations commences to run upon the cause of action at the time it accrues to the person from whom it was derived by subrogation, and the devolution of such cause of action does not interrupt the running of the statute. (p. 835.)

SUBROGATION—Statute of Limitations—Payment of Lien by Married Woman.—If a wife pays a mortgage on the homestead, which

her husband has assumed, to prevent a foreclosure, without intending to relinquish her right to repayment, and the statute of limitations has already commenced to run against the mortgagee's right to foreclose, such statute is not suspended as to her right of subrogation, and that right is barred when the mortgagee's right to foreclose is barred. (p. 837.)

LIMITATION OF ACTIONS.—When once the statute of limitations has commenced to run on a cause of action, circumstances not expressly provided for by statute will not interrupt its running. (p. 838.)

Plaintiff filed a claim for one thousand dollars and interest in proceedings for the settlement of her deceased husband's estate. Such sum was alleged to have been paid by her on a mortgage on the homestead of herself and husband, which he had assumed to pay. The payment was made, not voluntarily, but to prevent a foreclosure of the mortgage, with no intent on her part to relinquish her right of repayment of the money from her husband or his heirs. And no part of the money was ever repaid to her. Judgment for the plaintiff, and the defendant appealed.

Markham & Markham, for the appellant.

Malone & Miller, for the respondent.

[300] MARSHALL, J. Several supposed defects in the appeal from the county court are pointed out in the brief of counsel, but it does not appear by the record that any objection to the jurisdiction of the circuit court was made, except upon the [301] ground that the appeal bond was not filed in the county court until three days after the notice of appeal was filed. By submitting, as was done, to a trial on the merits all objections to defects in the appeal, not prior thereto brought to the attention of the circuit court and duly insisted upon, are waived: Kasson v. Estate of Brocker, 47 Wis. 79, 1 N. W. 418.

Section 4032 of the Statutes of 1898, upon which counsel for appellant rely in support of the objection as regards the filing of the bond, is remedial and must be liberally construed so as to give the largest measure of protection to the right of appeal which it will reasonably permit. Such right is given by section 4031, which provides that any person aggrieved by a decision of the county court "may appeal therefrom to the circuit court by filing a notice thereof with said county court within sixty days from the date of the act appealed from, ... together with such undertaking as is re-

quired in" section 4032. A literal compliance with the words of the statute is not necessary. Substantial compliance is sufficient: Perkins v. Shadbolt, 44 Wis. 574. The prime essential in taking an appeal is the filing of a notice of appeal within the time limited therefor. That being done, the filing of the bond afterward will operate to perfect the appeal. In Perkins v. Shadbolt, 44 Wis. 574, it was held that a bond may be perfected even after the sixty-day period. The language of the statute as it then existed, and is now found in section 4032, was given substantially the same effect, as regards the language of the statute now found in section 4031, as has been given to somewhat similar statutes as regards appeals to this court: Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Section 4032 provides that the party appealing shall, "at the time of filing notice of appeal and before his appeal shall be effectual for any purpose, file with the county court an undertaking," etc., plainly indicating that, while for any purpose of the appeal, as regards official action in sending the papers to the appellate [302] court, it is ineffectual till the filing of the undertaking occurs, there is an appeal instituted by filing the notice of appeal within the proper time, which may be perfected, as least within such time. This court construed the statute with great liberality in holding in Perkins v. Shadbolt, 44 Wis. 574, that an appeal may be perfected after the expiration of the sixty-day period in case of the filing at first of an insufficient bond, but such holding very clearly precludes now reading the statutes so as to render failure to file the undertaking with the notice of appeal fatal to the proceedings, regardless of whether it is filed within the time limited for taking the appeal.

The claim was in the nature of an action upon contract. There is no suggestion in the statement of facts made in support thereof of a demand based upon equitable right of subrogation. Upon the cause assuming the character of an action pending in the circuit court, as it did on the appeal thereto being perfected and the record being properly filed in such court, it was an action pending there for legal relief—an action to recover upon contract. There was no evidence to support such a cause of action, but there was evidence, as the court viewed the matter, showing that respondent was entitled to be subrogated to the ownership of the mortgage interest which was discharged by the use of her money, and after finding the facts in that regard the court ordered the claim

to be amended accordingly, and thereon and upon such facts rendered the judgment complained of.

It has been repeatedly held that it is not permissible to entirely change the nature of a cause of action by amendment—by substituting one in equity for one at law, or one on contract for one sounding in tort: Carmichael v. Argard, 52 Wis. 607, 9 N. W. 470; Gilman v. Gross, 97 Wis. 224, 72 N. W. 885; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032; Gates v. Paul, 117 Wis. 170, 94 N. W. 55; Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63.

The learned court seems to have supposed that the cause [303] of action, as originally stated, was in equity and so justified the amendment. The judge said in disposing of the matter: "The case is in equity. It is very much like Gudden v. Estate of Gudden, 113 Wis. 297, 89 N. W. 111." Plainly, he entirely misconceived that case. It was not an action in equity It clearly was one to recover on contract for money loaned. If the evidence here, in any reasonable view of it, established a cause of action in respondent's favor, it was purely equitable to recover in the right of the mortgagee to whom the money was paid. However, it is difficult to discover facts found, or established, sufficient to support such an action. Moreover, while the court ordered respondent's complaint—we so speak of the claim filed—amended so as to form a basis for a recovery upon the ground of subrogation, it seems that the judgment was not appropriate thereto. The equitable right could not reach beyond the property conserved by the payment of the money to discharge the lien thereon or some property into which it was converted and in which it could be identified. No mere money demand was created by the payment of the mortgage. There was no proof here that the property conserved was possessed by the husband at the time of his death, either in the form it was in at the time of the payment of the mortgage or in any other. The learned court seems to have supposed that if the respondent was subrogated to the rights of the mortgagor, that included an equitable transfer of the money demand against her husband so that she could sue upon it. Obviously, the equitable assignment went no further than the mortgagor's interest in the property, the debt itself being merely kept alive so far as necessary to support the lien, not so as to constitute in the hands of respondent any legal claim whatever.

The trial court went beyond the law of subrogation in this case. If one is compelled to pay a debt for which he is not personally liable in order to protect his interest in the property upon which such a debt is a charge superior to such [304] interest, he thereby becomes equitably entitled to have the prior lien preserved and enforced as the original owner might have had it enforced, so far as necessary for his protection against loss: Watson v. Wilcox, 39 Wis. 643, 20 Am. Rep. 63; McLaughlin v. Estate of Curts, 27 Wis. 644; Morgan v. Hammett, 23 Wis. 30; Levy v. Martin, 48 Wis 198, 4 N. W. 35; Wilton v. Mayberry, 75 Wis. 191, 17 Am. St. Rep. 193, 43 N. W. 901, 6 L. R. A. 61; Cockrum v. West, 122 Ind. 372, 23 N. E. 140; Royal Arcanum v. Cornelius, 198 Pa. St. 46, 47 Atl. 1124; Lowrey v. Byers, 80 Ind 443; Goldsmith v. Stewart, 45 Ark. 149; 7 Words and Phrases, 6721.

Rightly understood, subrogation existed entirely independent of contract relations. It is wholly a creature of equity—a mere means by which the substantial ends of justice may be accomplished. If a person pays off a lien claim on property for which he is not, but another is, liable, so that such other would derive the benefit thereof, if his interest in the property were entirely relieved from such lien, and such person acts in the matter, not as a mere volunteer, but to protect his own interest in such property, such interest being legal or equitable, and either present or contingent, equity immediately operates in favor of such person by preserving such lien claim to him with the same right to enforce it as the original owner possessed, to the extent that such person would otherwise suffer loss to such other's gain. Such enforcement in the hands of the equitable assignee is, in effect, asking for something in the right of the equitable assignor. The scope of the right is not enlarged to the gain of nor diminished to the prejudice of the equitable assignee by its devolution from one to the other. If a person paying off the lien is secondarily liable for the debt, there springs out of the transaction an implied promise by the one primarily liable to repay the money. That does not rest on the law of subrogation. It is enforceable as a legal liability, but where the payment is merely to protect the interest of the payor, as in this case, equity only [305] operates to keep alive the lien upon the property for the benefit of the payor.

Here we are speaking of the right acquired by the mere circumstance of payment under the circumstances indicated,

not of the right one might have if the person receiving the payment, voluntarily recognizing the equity of the situation, or being compelled to do so by equity jurisdiction, as might be done in some circumstances, assigns the legal claim against the person primarily liable therefor. In such circumstances, of course, the right to be clothed with the title to the legal claim rests on the law of subrogation, but so long as there is no transfer, other than by devolution by operation of equity from the mere circumstances of payment, the person possessing the equitable title can only follow the property upon which the charge rests by the use of equity jurisdiction. In case of payment of a mortgage lien, as in this instance, no right to an assignment of the legal claim or assignment of the mortgage by act of the mortgagee exists: Sheldon on Subrogation, sec. 45. That is so because the devolution of the mortgage lien and equitable preservation of the indebtedness, so far as necessary to support it, is all that is required for the protection of the one making the payment. The right by subrogation, as we are now treating it, is entirely inconsistent with the continued existence of the legal claim against the mortgagor, because it springs out of the circumstance of the legal claim being extinguished: Sheldon on Subrogation, sec. 6. Thus, in any view of the law, it will be seen that the only right respondent acquired by the act of her having paid the debt of her husband secured upon the homestead was limited to an enforcement of the mortgage lien as to the mortgaged property, or its equivalent in a changed form into which it could be traced and identified.

It would seem without authority that the principles of subrogation should apply to a case where a married woman having an interest in a homestead, the title to which is in her
306 husband, and which is encumbered by a mortgage to secure his debt, without request by him, but solely to protect her homestead right, pays off the encumbrance, and the authorities so hold: Jefferson v. Edrington, 53 Ark. 545, 14 S. W. 99, 903; Smith v. Hall, 67 N. H. 200, 30 Atl. 409; Ohmer v. Boyer, 89 Ala. 273, 7 South. 663.

If we could successfully pass in favor of respondent the entire change in the theory of the cause of action, which occurred as before indicated, and the rendition of a judgment upon the one that the legal claim against the mortgagor passed to respondent as a result of her paying the same, or that such payment created anew such claim so that it could

be enforced as a money demand in favor of respondent, and that, too, without any proof whatever that the mortgaged property, in specie or in a converted form, could be identified as forming a part of the estate of her deceased husband, there would yet be an insuperable obstacle in the way of a recovery by reason of the statute of limitations, as we shall see.

Counsel for appellant insist upon the statute of limitations as a defense, though conceding that according to the decisions of this court such defense is not available in an action between husband and wife, and request reconsideration of our decisions in that regard. Counsel seem to concede more than is respondent's due under the facts of this case. If that were not true, it is too late to reconsider the question of whether the statute of limitations operates on a transaction between husband and wife giving rise to a cause of action between them. It should be noted that our decisions, when applied to the facts of the cases in which they were made, have not gone further than that. The common-law rule is that the limitation statutes do not run against a married woman, subject to the exception that where it has commenced to run on a cause of action the intervening circumstance of marriage will not interrupt it. The rule in its origin was grounded on the disabilities of coverture. In our statute of limitations [307] at first (Rev. Stats. 1849, c. 127), adopted when married women were yet under such disabilities, in harmony therewith, they were expressly exempted therefrom (c. 127, sec. 12, subd. 4, aforesaid). That was carried into the statute of 1858 (c. 138, sec. 29, subd. 4). In Wiesner v. Zaun, 39 Wis. 188, although the disabilities of coverture giving rise to such common-law rule had ben abrogated by statute, the circumstance that the legislature had not also repealed the statutory exemption from the limitation statute as to married women was so strongly indicative of a purpose to preserve it, notwithstanding such abrogation, it was decided that the court was not warranted in holding that such statutory exemption was repealed by implication. That was affirmed in Westcott v. Miller, 42 Wis. 454. It may be that such situation led to the omission of such exemption in the revision of 1878, when the law took the form now found in section 4233 of the Statutes of 1898: Rev. Notes, p. 290. However, in Second Nat. Bank v. Merrill, 81 Wis. 151, 29 Am. St. Rep. 877, 50 N. W. 503, where a transaction between husband and wife was involved, without referring to the

statutory and judicial history we have detailed, but on the ground of public policy, it was said that "the statute of limitations does not run against a wife, and presumption of payment by lapse of time does not prevail against her." The reason assigned is somewhat novel, but the case was followed in Fawcett v. Fawcett, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405, and again in Brader v. Brader, 110 Wis. 423, 85 N. W. 681, though the court in the latter case declined to accede to the doctrine as right, except in that lapse of time had made it a rule of property. Each of the last three cases stated arose out of a transaction between husband and wife. We are constrained not to extend the doctrine thereof so as to cover a cause of action not so arising, and upon which the limitation statute commenced to operate before the parties became adversaries in respect thereto. Generally speaking, such a statute is not subject to any exemption whatever not found in the written law: Pietsch v. Milbrath, [308] 123 Wis. 647, 107 Am. St. Rep. 1017, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945. But the judicial exemption firmly intrenched here by Brader v. Brader, 110 Wis. 423, 85 N. W. 681, within the scope of the cases where it has been applied, must be adhered to. Enough has been said to see that it is not applicable to the facts here, and if that were not so the difficulty with respondent's position would still remain, as we shall see.

As has been indicated, the right acquired by respondent by the payment of the mortgage indebtedness was a privilege to use the mortgage lien to recover the money back out of the mortgaged property—one unlike the case where a person secondarily liable for an indebtedness pays off the same. In such circumstances, as we have seen, by the equity of the law, privity is created between the payor and the primary debtor essential to contractual relations. The right of subrogation merely justifies the payor in asserting the mortgage right of the payee, which, though extinguished, is kept alive as an equitable charge for the benefit of the latter. The statute of limitations commences to run on a cause of action on implied contract, where one accrues in the manner stated, upon the happening of circumstances creating the implied promise, and upon such cause of action being extinguished by the statute of limitations, the equitable right of subrogation to the use of securities incident to the contract right falls also. If there is merely the right of subrogation to an interest in property, not incident to any legal right, as in this case, the statute of

limitations commences to run upon the cause of action at the time it accrues to the person from whom it was derived by subrogation. The devolution of such cause of action does not interrupt the running of the statute. Upon the termination of the full statutory period measuring the life thereof, it is destroyed: Rittenhouse v. Levering, 6 Watts & S. 190; Arbogast v. Hays, 98 Ind. 26; Kreider v. Isenbice, 123 Ind. 10, 23 N. E. 786; Fink v. Mahaffy, 8 Watts, 384; Joyce v. Joyce's Admr., 1 Bush, 474; Boevink v. Christiaanse, 69 Neb. 256, [309] 95 N. W. 652; Walker v. Vaudry, 4 Rob. (La.) 395; Sheldon on Subrogation, sec. 110; Harris on Subrogation, sec. 841. To enable a person to see what interest one has in the property of another by the light of subrogation he must look at the matter from the viewpoint of the original owner before the devolution.

Harris at the section above cited, using Walker v. Vaudry, as an illustration, says: "Plaintiff being subrogated, as he was, to all the rights of A, can have and exercise no greater rights than he had. This is a cardinal principle in all cases of subrogation."

The court said in the illustrative case: "Howe, who had obtained his judgment against Vaudry on the sixteenth day of December, 1840, could not have brought a revocatory action against him on the thirty-first day of October, 1842. It is equally clear that if Howe could not do it, Walker cannot; for a person subrogated to the rights of another cannot have any other or greater rights than the latter had."

In Boevink v. Christiaanse, 69 Neb. 256, 95 N. W. 652, the court pointed out distinction between the operation of the statute of limitations where there is the mere right of subrogation to the interest of a mortgagee in property and where there is a legal claim with the equitable right by the law of subrogation to use a mortgage lien, though extinguished as to the mortgagee, as an aid to the enforcement of such claim. It was said that in the latter case the right to enforce the security will in no event survive, as regards the statute of limitations, the right to enforce the claim, and in the former that it will not survive the limitation period upon the cause of action to enforce the security itself, measuring from the maturity of such security. In that instance there was a mortgage with the equitable right to enforce the lien, obtained as in this case, and it was held that the cause of action, in that regard, dated from the maturity of the mortgage.

310 We must distinguish not only between a cause of action to enforce a security by right of subrogation in aid of realizing on a legal claim, and such a case where there is no such claim, but between a cause of action based on the security and the cause of action to enforce it. The situation is similar to where a person sues in behalf of himself and others to enforce a cause of action existing in favor of a third person in which the plaintiff and his associates have an interest that can only adaquately be thus protected. The cause of action to be enforced is one thing, the cause of action to enforce it is another; neither can survive the death of the other.

So it will be seen that the limitation period upon the enforcement of the mortgage paid off by respondent expired long before her claim was filed in the proceedings to settle her husband's estate and long before his death, unless her rights in that regard were saved by the exception in favor of married women, as regards the statute of limitations. The fact that she made the payment in 1870 because of a threatened foreclosure shows that the mortgage had previously matured, and that the cause of action thus created, so far as it could be deemed alive at all, was some thirty years old at the time of the commencement of this proceeding. The life of such a cause of action is limited to twenty years: Stats. 1898, sec. 4220.

The respondent here, if she could recover at all, could only do so in the right of the mortgagor to whom she made the payment. The only cause of action which arose upon the making of such payment was one to enforce the cause of action upon the mortgage possessed by the mortgagee at the time of payment. Obviously, had the mortgage not been paid off, the mortgagee could not have enforced it at the time this action was commenced. The limit of his right under such circumstances was the limit of respondent's because since the statute of limitations had commenced running against the mortgage before she became the equitable owner of the lien, 311 such devolution did not interrupt its running. As we have said, where once the statute of limitations has commenced to run on a cause of action, no circumstances not expressly provided by statute—and we have no statute applying to the circumstances here—will interrupt it: Wood on Limitations, 3d ed., sec. 6.

"The course of decisions, both in England and in this country, has established the rule beyond doubt that when the statute of limitations has commenced running [save as other-

wise provided by the written law], it runs over all subsequent disabilities and intermediate acts and events." "Nor is there any difference between a voluntary and involuntary disability": Dekay v. Darrah's Admrs., 14 N. J. L. 288.

So in any way we can view this case the respondent had no cause of action when she filed her claim.

By the COURT. The judgment is reversed, and the cause remanded with directions to render judgment in favor of appellant.

The Right to Subrogation is the subject of an extended monographic note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 474-533.

HALSEY v. WAUKESHA SPRINGS SANITARIUM COMPANY.

[125 Wis. 311, 104 N. W. 94.]

BUILDING CONTRACTS—Total Destruction of Building.—If complete performance of an entire contract to do work upon another's building is prevented by the total destruction of such building, such completion is excused, and the contractor may recover pay at the contract price for the portion of the work done. (p. 839.)

BUILDING CONTRACTS—Architect's Certificates.—An agreement that an architect's certificate shall be a condition precedent to a contractor's right to payment is valid, but is always deemed to embody the condition that the architect shall exercise his function as arbitrator in good faith. (p. 839.)

BUILDING CONTRACTS—Architect's Certificate.—One who performs his contract to build may recover his pay therefor notwithstanding an agreement that an architect's certificate shall be a condition precedent to payment if it appears that he is disabled from obtaining such certificate by collusive, fraudulent, arbitrary, or unreasonable refusal by such architect. (p. 839.)

MECHANICS' LIENS—Enforcement.—If a mechanic's lien claim and the complaint in an action to foreclose it describe a twelve acre tract as that on which the lien is demanded, while the evidence shows that only one acre thereof can be so subject, the statutory requirement of a claim for lien describing the land is satisfied, and it is the duty of the court to ascertain the one acre within the parcel so claimed which should contain the building and be subjected to the lien. (p. 841.)

MECHANICS' LIENS—Destruction of Building.—A mechanic's lien having once attached to land is not detached by the total destruction of the building which formed the basis for the lien. (p. 842.)

C. H. Hamilton and Timlin & Glicksman, for the appellant.

Tullar & Lockney and Ryan, Merton & Newbury, for the respondents.

[314] DODGE, J. 1. When complete performance of an entire contract to do work upon another's building is prevented by the total destruction of that building, such completion is excused, and the contractor may recover pay at the contract price for the portion of the work done: Cook v. McCabe, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90. The present case falls clearly within this rule, for plaintiff was only to do work upon a building to be supplied by the owner or its employés.

2. The efficacy of an agreement that an architect's certificate shall be a condition precedent to a contractor's right to payment has often been declared: Coorsen v. Ziehl, 103 Wis. 381, 79 N. W. 562; John Pritzlaff H. Co. v. Berghoefer, 103 Wis. 359, 79 N. W. 564; Mindeman v. Douville, 112 Wis. 413, 88 N. W. 299. Such an agreement is, however, deemed and construed to embody the condition that the architect shall exercise his function as arbitrator honestly and in good faith. He usually is, as in the instant case, the employé and agent of the owner, and, but for such a condition, can, if he will, absolutely deprive the contractor of all pay for his work, however exactly it may comply with the contract. An agreement to submit the question of pay or no pay to the mere whim, or worse, of one in an opposing interest is too [315] absurd for belief that parties' minds met thereon. Hence the rule is well established that he who performs his contract may recover in court his pay thereof, notwithstanding such agreement, if it appear that he is disabled from obtaining the architect's certificate by collusive, fraudulent, arbitrary, or unreasonable refusal by the latter: Hudson v. McCartney, 33 Wis. 331; Bentley v. Davidson, 74 Wis. 420, 43 N. W. 139; Wendt v. Vogel, 87 Wis. 462, 58 N. W. 764. More obviously still is one excused if the issue of the certificate is prevented by act of the owner: Bannister v. Patty's Exrs., 35 Wis. 215; Ashland etc. Co. v. Shores, 105 Wis. 122, 81 N. W. 136; Boden v. Maher, 105 Wis. 539, 81 N. W. 661; Mindeman v. Douville, 112 Wis. 413, 88 N. W. 299; McDonald v. Patterson, 186 Ill. 381, 57 N. E. 1027.

The evidence as to what transpired after the fire between plaintiff, the architect, and Dr. Caples, the defendant's man-

aging officer, is not in dispute. Upon presentation of plaintiff's final bill the architect assured him that his work was all satisfactory except a mixing table, but said he could not give certificate because Dr. Caples had withdrawn from him the contract. The architect testified that after such withdrawal of the contract he exercised no authority under it and so stated to plaintiff. At the same time he told plaintiff he must see and deal with Caples. Thereupon plaintiff applied to Caples for payment, was met with no suggestion that a certificate was needed or would vary the situation, but was told the defendant would compromise by allowing eighty-five per cent of the total bill, and by giving plaintiff a contract on rebuilding, and if that were not accepted they would keep him out of his money as long as they could. There was no claim that the defendant did not legally owe the whole amount, nor that Caples needed the certificate or any information from the architect to assure him of the work done or the amount due, of which it appears the architect had already
[316] informed him. We can entertain no doubt that the conduct of the architect in refusing a certificate was arbitrary, unjust, and, in the legal sense, fraudulent. It was the architect's duty, as between plaintiff and defendant, to exercise his judgment and make a decision as to whether plaintiff was or was not entitled to the sum demanded, and, if not, then to what sum. His errors in performing such duty might be unassailable. When, however, he refused to act—refused to exercise his agreed jurisdiction—there was no room for mere error. It constituted, not a wrong decision, but an arbitrary and unjust refusal of any decision. If the architect may be absolved from any conscious or intentional wrong or fraud against plaintiff, it can only be because the withdrawal of the contract disabled him from exercising his function. That brings us at once in contact with the rule above stated—that defendant's own acts preventing the issue of such certificates will, a fortiori, excuse plaintiff from producing one. The trial court clearly erred in holding that absence of the architect's certificate, under the circumstances, was any obstacle to plaintiff's recovery.

The item of one hundred and fifty dollars deduction for a mixing table rejected by the architect as not in accord with specifications cannot be allowed, although there is much evidence to dispute the architect's decision. On that subject he did act within his agreed jurisdiction and his ruling is con-

clusive. There is no evidence to support any other deductions from the amount demanded by the complaint.

The fact that the claim for lien filed, as also the complaint, described a twelve-acre tract of land as that upon which lien was demanded, while by the evidence it appears that only one acre can be so subject, is urged as an obstacle to recovery. In this contention it is apparent that counsel have confused rulings made in different decisions. Thus in Security Nat. Bank v. St. Croix P. Co., 117 Wis. 211, 94 N. W. 74, and Dusick v. Green, 118 Wis. 240, 95 N. W. 144, the right to
[317] a lien was defeated because the plaintiff had failed to file within the statutory six months any claim for or notice of lien containing a description of any parcel of land whatever; hence, the condition precedent to a lien demanded by the statute was lacking. In those cases the attempted description was such as not to define any parcel of land which could be segregated on the ground, so that a purchaser could know whether any given parcel which he might desire to buy was claimed to be subject to the lien or not. In other cases, however, where, as in this, a fully defined piece of ground was specified as that upon which the lien was claimed, but was found to exceed the amount upon which it could be sustained, it has been held to be the duty of the trial court, as in the case of other excessive demands, to award judgment for that portion of the whole tract to which plaintiff is entitled under the evidence: McCoy v. Quick, 30 Wis. 521; Dusick v. Green, 118 Wis. 240, 95 N. W. 144. Here the tract of land claimed is in no wise ambiguous. It is the entire twelve acres. Hence the statutory requirement of a claim for lien describing the land, filed within six months, was satisfied; and although the complaint, following the notice, claimed the whole, it was the duty of the court to ascertain by proof one acre within said tract so claimed which should contain the building and be subjected to the lien. Owing to the ruling of the court that this could not be done, there is not evidence in the record to enable us to direct a judgment for any specific acre, and that subject will need to be referred to the trial court to take such further evidence thereon as may be necessary to enable it to embody an accurate description in its judgment.

The question whether a lien can be sustained against the land after the building on which the work was done has been destroyed is forced on our notice by Goodman v. Baerlocher, 88 Wis. 287, 43 Am. St. Rep. 893, 60 N. W. 415, although the

point is not raised. That case has been understood by some as declaring our adoption of what may be called the Pennsylvania theory—that a [318] mechanic's lien primarily has no application to the land; that it attaches directly only upon the structure or building on which the mechanic works, and reaches the land only because of the inseparability of the building from the land to which it is annexed. The corollary deduced from such theory is that whenever the building goes out of existence the lien goes with it, because then there exists no connecting link between the work or materials supplied by the claimant and the ground. This view seems also to involve the proposition that the lien does not spring into existence upon the doing of the work, but only either when the structure comes into existence, or thereafter upon the filing of proper claim: Presbyterian Church v. Stettler, 26 Pa. St. 246; Wigton's Appeal, 28 Pa. St. 161; Linden S. Co. v. Rough Run Mfg. Co., 158 Pa. St. 238, 27 Atl. 895. As conceded in Goodman v. Baerlocher, 88 Wis. 287, 43 Am. St. Rep. 893, 60 N. W. 415, this view is repudiated by most other courts under statutes resembling our own: Freeman v. Carson, 27 Minn. 516, 8 N. W. 764; Clark v. Parker, 58 Iowa, 509, 12 N. W. 553; Steigleman v. McBride, 17 Ill. 300; Sontag v. Brennan, 75 Ill. 279; Paddock v. Stout, 121 Ill. 571, 13 N. E. 182; Stuart v. Broome, 59 Tex. 466. It would appear quite doubtful whether the court did declare itself in favor of the Pennsylvania rule in Goodman v. Baerlocher, 88 Wis. 287, 43 Am. St. Rep. 893, 60 N. W. 415, or rested its decision on the other apparent ground, namely, efficacy of complete breach by the principal contractor to prevent subcontractor's lien, on authority of Malbon v. Birney, 11 Wis. 107; but apparently the latter interpretation has been repudiated in Seeman v. Biemann, 108 Wis. 365, 84 N. W. 490. Whatever construction be given the Goodman case, however, we deem it clear that the grounds on which the Pennsylvania rule rests have no existence under our lien statutes and have been repudiated in at least two recent cases in this court: Viles v. Green, 91 Wis. 217, 64 N. W. 856; Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 294, 82 N. W. 717. Where it is held that the mechanic's lien arises by law upon the doing [319] of work or furnishing materials, in case construction of a building be actually commenced, and is not dependent for original existence either upon the filing of a claim or upon the construction of a build-

ing to which it must first attach in order to reach the land. In the latter of these cases the architect's lien was held to have attached to the land the moment excavation for the building commenced. Clearly, if the lien may fasten on the land before any structure exists thereon, it may persist after such structure disappears. Several of the provisions of our statute (Stats. 1898, sec. 3314) are so inconsistent with the necessity of any structure for a lien to fasten upon as to preclude belief in any such legislative idea—notably those of excavating, dredging, road repairing, and the like. We conclude that the Pennsylvania rule has no place under our statute, and that plaintiff's lien, having once attached to the land, was not detached by the destruction of the building which defendant had impliedly contracted should remain in existence to enable completion of plaintiff's contract.

By the COURT. Judgment reversed, and cause remanded with directions to take further proceedings and render judgment in plaintiff's favor in accordance with the foregoing opinion.

If the Parties to a Building Contract agree that the architect shall pass upon the work and certify upon payments to be made, his decision is usually binding and can be attacked only for fraud, mistake and the like: See the monographic note to Baltimore etc. Ry. Co. v. Scholes, 56 Am. St. Rep. 312-316.

The Destruction of a Building before its completion, as affecting the builder's right to compensation, is discussed in the monographic note to Huyett v. Chicago Edison Co., 59 Am. St. Rep. 285-289. One engaged to make repairs or do other work on the house of another under a special contract may recover for what he has done when the completion of his contract becomes impossible on account of the destruction of the house without his fault: Angus v. Scully, 176 Mass. 357, 79 Am. St. Rep. 318. See, in this connection, Middlesex Water Co. v. Knappmann-Whiting Co., 64 N. J. L. 248, 81 Am. St. Rep. 467; Nicol v. Fitch, 115 Mich. 15, 69 Am. St. Rep. 542.

The Right to a Mechanic's Lien as affected by the destruction of the building is discussed in Goodman v. Baerlocher, 88 Wis. 287, 43 Am. St. Rep. 893, and note, and in the recent case of Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 106 Am. St. Rep. 75. In some states the right to a lien for work done in the construction of a building is not dependent upon whether the building is actually completed, but upon whether the construction is commenced: Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 824; Baker v. Waldron, 92 Me. 17, 69 Am. St. Rep. 483. See, in this connection, Hutchins v. Bautch, 123 Wis. 394, 107 Am. St. Rep. 1014.

BOYLE v. NORTHWESTERN NATIONAL BANK.

[125 Wis. 498, 103 N. W. 1123, 104 N. W. 917.]

BANKS AND BANKING—Trust Funds.—If money held by a person in a fiduciary capacity, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands. (pp. 845, 846.)

BANKS AND BANKING—Trust Funds.—If a broker sells grain on commission and deposits the proceeds, together with his commissions, in a bank to the credit of the account under which he does business, such deposit, pending a settlement of his account with his customers, constitutes a trust fund, which, to the extent of the balance of the deposit at the termination of the broker's business, the bank cannot hold, as against such customers, to apply on an old indebtedness of a corporation of which he had formerly been president, although the money has been mingled with the general funds of the bank. (p. 846.)

BANKS AND BANKING—Trust Funds.—If a broker deposits the proceeds of grain sold by him to the credit of a bank account under which he does business, and the bank, with knowledge that the money so deposited belongs to his customers, induces him to give a check on such account to apply on an indebtedness of a corporation of which he was formerly president, subsequent customers of such broker whose money has gone into such deposit cannot impose a trust to the amount of such check thereon, for their benefit, when the amount thus diverted did not arise from the sale of their property. (p. 847.)

TRUST FUNDS.—The right to trace and charge money constituting a trust fund rests upon the right of property in the person bringing the action, and cannot rest upon the theory of preference by reason of an unlawful conversion. (p. 847.)

S. L. Perrin, for the appellant.

J. Brennan, Luse, Powell, De Forest & Luse, and E. C. Kennedy, for the respondents.

505 CASSODAY, C. J. 1. Under the findings of the court and the evidence, the commission business in which Mr. Schwedler was engaged from September 6, 1901, to February 10, 1902, must be regarded as his personal business and not a continuation of the business of the old grain corporation of 506 which he had previously been the president, and which corporation was indebted to the bank during the time mentioned in the sum of $4,000. It appears from the findings, and is undisputed, that the moneys received from time to time by Mr. Schwedler on the sale of grain and flax on commission during the period mentioned were deposited by him in the bank and that he drew checks thereon as stated. It also appears and is undisputed that the last deposit so made by him

was on February 8, 1902, the same proceeds of the sale of Larson's grain; that, after making that deposit, Mr. Schwedler only gave three checks drawn on that account, amounting in the aggregate to $109.20; and that after deducting that amount from the amount standing to his credit on the books of the bank there remained a balance to his credit on the morning of February 10, 1902, of only $648.13, notwithstanding Mr. Schwedler had deposited in the bank to the credit of that account between December 1, 1901, and February 10, 1902, $2,770.38, being the proceeds of sales of grain and flax belonging to the plaintiff and the five interveners, respectively, and none of which had been paid to them or any of them. On February 10, 1902, the bank, without the knowledge or consent of Mr. Schwedler, or the plaintiff, or any of the interveners, and upon an unsigned check or memorandum drawn by itself, as found, charged said account with $648 and credited the same amount to its cashier's account; and by virtue of such charge and credit so made the bank claims the right to withhold said $648 from the plaintiff and the five interveners and any of them, and apply the same upon the debt which the grain corporation owed the bank. The trial court held that such claim was without foundation, and that such charge and credit so made were improper, illegal, and in no way affected or diminished the amount of $648.13 so standing to the credit of Mr. Schwedler on the morning of February 10, 1902. One of the important questions in the case is whether such ruling of the trial court is [507] correct. It is to be observed that Mr. Schwedler makes no claim to any part of the money so on deposit. It is also found that the plaintiff and the five interveners are the only persons whose moneys were so deposited in said account and who have not been paid.

The question recurs whether, in equity, the money so on deposit should be paid to the owners of the produce from which it was realized or to the bank, to be applied on its old claim against the grain corporation. It is very evident that whenever Mr. Schwedler sold a carload of grain or flax on commission, and received pay for the same, such proceeds, after deducting commissions, freight, inspection, and other charges, were held by him for the owner of the grain or flax so sold. The contention seems to be that by depositing such proceeds in the bank to the credit of such account the same became mixed with the funds of the bank generally, and that by reason of such mixture it became impossible to trace and

identify the particular money so deposited as entering into any specific fund or property so sought to be charged. In support of such contention counsel cite Nonotuck Silk Co v. Flanders, 87 Wis. 237, 58 N. W. 383; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Dowie v. Humphrey, 91 Wis. 98, 64 N. W. 315; Bromley v. Cleveland etc. Co., 103 Wis. 562, 79 N. W. 741; Hyland v. Roe, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252. These cases do not, in our judgment, go to the extent claimed. On the contrary, "the more recent rule in England," followed in these cases, is that: "If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands": In re Hallett's Estate, L. R. 13 Ch. D. 696.

The reasons for the rule are so fully stated by the learned master of the rolls in that case as to render it unnecessary 508 to add to such reasoning here. At least two of the cases cited by counsel for the defendant expressly sanction the rule thus quoted, and the others, in a general way, approve of the decision from which they are quoted. There is no purpose here of renewing a discussion which is so fully covered upon reason and authority by our own cases. Nevertheless we venture to quote from two decisions in the supreme court of the United States what seems to be particularly applicable to the case at bar: "Although the relation between a bank and its depositor is that merely of debtor and creditor, the money which he deposits, if held by him in a fiduciary capacity, does not change its character by being placed to his credit in his bank account. The bank contracts that it will pay the money on his checks, and when they are drawn in proper form it is bound to presume, in case the account is kept with him as a trustee, or as acting in some other fiduciary character, that he is in the course of lawfully performing his duty, and to honor them accordingly; but when against such an account it seeks to assert its lien for an obligation which it knows was incurred for his private benefit, it must be held as having notice that the fund is not his individual property, if it is shown to consist, in whole or in part, of money which he held in a trust relation": National Bank v. Insurance Co., 104 U. S. 54, 26 L. ed. 693.

"A bank receiving on deposit from a factor, under the circumstances set forth in this case, moneys which it must have

known were the proceeds of property of the factor's principal, consigned to him by the principal for sale on the principal's account, of which moneys the principal was the beneficial owner, cannot, as against the latter, appropriate the deposits to the payment of a general balance due to the bank from the factor; and if it attempts to do so, the remedy of the principal against the bank is in equity and not at law": Union Stock Yards Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. Rep. 118, 34 L. ed. 724.

Upon the strength of these authorities and many others which might be cited, it is manifest that the $648.13 standing to the credit of Mr. Schwedler on the books of the bank on
509 the morning of February 10, 1902, was in equity the property of the owners of the net produce from which the same was realized, and should be paid to such owners according to their proportionate share thereof in equity.

2. The right to the $500 mentioned is governed by a different principle. The trial court held, in effect, that the check given by Mr. Schwedler on said account to the president of the bank October 8, 1901, for $500, and charging of the same to said account, and issuing the cashier's check therefor, and crediting the amount of the check to the cashier's account was only, in effect, a method of bookkeeping and was improper and ineffectual and did not in any wise affect the fund in the bank to the credit of said account. Assuming such findings and ruling to be correct the question recurs whether the trial court properly held that the $500 thereafter remained to the credit of Mr. Schwedler's account, and was in equity the property of the plaintiff and the interveners and subject to be charged as such in this action. The nature of the action seems to have been lost sight of. This is not a proceeding by attachment or garnishment. The question is not whether the bank wrongfully induced Mr. Schwedler to give the check on the fund in the bank, which in equity belonged to his consignors, but whether such fund belonged to the plaintiff and the interveners, or some of them, at the time the check was so given. As stated in some of the adjudications cited, the right of action to trace the moneys and charge the fund has its basis in the right of property, but never upon the theory of preference by reason of an unlawful conversion: Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383. So, as stated by Mr. Justice Pinney in one of the cases cited and reiterated in others: "When the trust fund cannot be identified or traced

into some specific estate or substituted property, and the means of ascertainment fail, the trust wholly fails, and the party can only prove as a general creditor. As the right to [510] trace his trust fund is founded on the right of property and not on the ground of compensation for its loss, he must be able to point out the particular property into which the fund has been converted. When he is unable to do this, the trust fails and his claim becomes one for compensation only, for the loss of the fund, and stands on the same basis as the claims of general creditors. Where the trust fund cannot be traced, and the substituted property into which it has entered specifically identified, the trust fund must be regarded as dissipated, within the meaning of the authorities—scattered, dispersed, and, as such, destroyed": Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Dowie v. Humphrey, 91 Wis. 98, 103, 64 N. W. 315.

Mr. Schwedler's check for $500 was given to the bank nearly two months prior to the time when the plaintiff or any of the interveners shipped any grain to Mr. Schwedler, and more than two months prior to the time when any money belonging to the plaintiff or any of the interveners was so deposited in the bank. This being so, it is very obvious that such check was not drawn upon any fund in which the plaintiff or any of the interveners had any interest. If, as found by the court, Mr. Schwedler, at the time of giving that check, notified the president of the bank that the money then in the bank to his credit in said account did not belong to him nor to the grain corporation, but did belong to those who had previously made consignments to him, still that could give no right of action in favor of the plaintiff or any of the interveners, in equity, to charge the fund then in the bank. In other words, the plaintiff and the interveners can only recover in this form of action by showing that they, or some of them, are the equitable owners of the fund sought to be charged, and not by showing that some stranger to the action had such right of action. We must hold that the trial court improperly held the bank liable for the fund of $500 covered by Mr. Schwedler's check of October 8, 1901.

By the COURT. The judgment of the superior court for Douglas county is hereby modified by reducing the amount [511] of the recovery from the First National Bank to $648.13, and that the same be divided between the parties equitably entitled, as indicated in this opinion, and that, as so modified,

the judgment is affirmed, with costs in favor of the appellant.

A motion for a rehearing having been made, it was denied and a further opinion delivered as follows:

CASSODAY, C. J. The motion for a rehearing presents no ground for holding the bank liable in this action for the $500 for which Mr. Schwedler gave his check more than a month prior to the time when any money belonging to the plaintiff or to any of the interveners was deposited in the bank. The reason for this ruling is sufficiently stated in the opinion filed (ante, pp. 844-848, 103 N. W. 1123, 1127, 1128). So, for the reasons there given (ante, pp. 844-848, 103 N. W. 1126, 1127), we adhere to the ruling there made "that the $648.13 standing to the credit of Mr. Schwedler on the books of the bank on the morning of February 10, 1902, was in equity the property of the owners of the net produce from which the same was realized, and should be paid to such owners according to their proportionate shares thereof in equity." We are now asked to fully determine the rights of the parties upon the facts here presented. While the principles upon which those rights are to be determined are stated in the former opinion, yet the rights of the respective parties are not there stated in detail.

The question is as to the proper distribution to be made of the $648.13 to the credit of Schwedler in the bank on the morning of February 10, 1902. As stated in that opinion, $1,161.43 belonging the plaintiff, Boyle, was deposited in the bank to the credit of Schwedler December 14 and 18, 1901. Upon the theory that there was only $648.13 to be distributed, it was found by the trial court and is undisputed [512] that the lowest balance to the credit of Schwedler between December 9, 1901, and February 10, 1902, was $153.50, on January 2, 1902. Since no money belonging to any of the interveners went into the bank prior to the day and year last mentioned, it is manifest that the $153.50 so to the credit of Schwedler January 2, 1902, was in equity the property of Boyle. It is also manifest, upon the principles stated, that the moneys belonging to Boyle which had been drawn from the bank on the checks of Schwedler prior to January 2, 1902, cannot be reached by him in this action. It appears from the findings and is undisputed that after January 2, 1902, and during that month, there were deposited in the bank to the credit of Schwedler moneys belonging to the following inter-

veners, respectively, in the amounts stated, to wit: Wibe, $426.92; Anderson, $430.38; McNeil, $147.35; and Brown, $165.20—making in the aggregate, with the amount so belonging to Boyle, $1,323.35. It also appears from the findings and is undisputed that the intervener Larson shipped to Schwedler a carload of grain, which he sold on commission, and the proceeds thereof, amounting to $527.78, were deposited in the bank to the credit of Schwedler February 4 and 8, 1902, and that after paying therefrom the freight, inspection, and other charges, including commissions, the balance thereof, amounting to $439.08, belonged to Larson, and that after such deposit of the proceeds of Larson's grain "the only checks drawn or paid upon said account were three in number, ... amounting in the aggregate to $109.20." Assuming that this amount was all paid from the proceeds of Larson's grain, then, by deducting this amount from the $527.78, the proceeds of Larson's grain so deposited, there remains a balance of at least $418.58 as belonging to Larson, and which must have been in the bank to the credit of Schwedler on the morning of February 10, 1902. We perceive no reason why Larson is not entitled to that amount in the judgment to be entered in this action. Deducting the $418.58 from the $648.13 [513] standing to the credit of Schwedler on the morning of February 10, 1902, and it leaves a balance of $229.55 to be distributed to Boyle and the four interveners whose moneys went into the bank to the credit of Schwedler in the month of January, 1902, as stated, according to their proportionate shares thereof in equity—that is to say, to Boyle, $26.63; to Wibe, $74.05; to Anderson, $74.65; to McNeil, $25.56, and to Brown, $28.66, making a total of $229.55. This gives to each a little over seventeen and one-third per cent on the amount of his claim for his money so on deposit in January, 1903. The division thus to be made is in accordance with the principles stated in the former opinion.

By the COURT. The judgment of the superior court for Douglas county is hereby modified by reducing the amount of the recovery from the First National Bank to $648.13, and that the same be divided between the parties equitably entitled, as indicated in the former opinion and as stated in this opinion, and that, as so modified, the judgment is affirmed, with costs in this court in favor of the appellant.

If a Bank Knows that a Factor is insolvent and has deposited in his own name moneys belonging to his principal, it cannot appropriate such money to the payment of its debts due from the factor, and is liable to the true owners if it does so: Interstate Nat. Bank v. Claxton, 97 Tex. 569, 104 Am. St. Rep. 885. But a bank cannot be held to account to the owner of a fund which has been deposited by an agent in his own name and applied on his overdraft, the bank having no notice of the agency: Kimmel v. Bean, 68 Kan. 598, 104 Am. St. Rep. 415.

The Right to Follow Trust Funds is discussed in the monographic notes to Ferchen v. Arndt, 46 Am. St. Rep. 608-610; Union Nat. Bank v. Goetz, 32 Am. St. Rep. 125-130. The general doctrine of the right to pursue trust funds is well expressed in Ober & Sons Co. v. Cochran, 118 Ga. 396, 98 Am. St. Rep. 118.

BEST v. GUNTHER.

[125 Wis. 518, 104 N. W. 82, 918.]

POWER OF ATTORNEY—Revocation.—At common law the revocation of a power of attorney to convey lands, to be effectual, must be brought to the personal notice of the agent. (p. 851.)

POWER OF ATTORNEY Recorded—Revocation.—A power of attorney to mortgage or convey lands is not within statutory provisions declaring the effect of recording conveyances of real estate, and the fact that after such power has been recorded a revocation thereof is also recorded does not terminate the power, nor affect a mortgage subsequently executed thereunder, in the absence of actual notice of such revocation to the agent. (p. 852.)

POWERS OF ATTORNEY—Revocation.—A statute providing that powers of attorney to convey lands may be recorded, and when so recorded shall not be deemed revoked by any act of the party who executed them unless the instrument of revocation be also recorded in the same office, does not affect a power of attorney to mortgage land which has been recorded, and as to which a revocation thereof has also been recorded, if notice of the revocation has not been given to the agent. (p. 853.)

Frame & Blackstone and Ritsher, Montgomery & Hart, for the appellant.

F. W. Houghton and W. B. Neelen, for the respondent.

520 SIEBECKER, J. The question presented is whether the recording of the instrument signed by Mary T. Gunther, purporting to revoke the power granted to her husband to convey her lands, operated to terminate this agency. The common law required that a revocation of such authority be brought to the personal notice of the agent: Kelly v. Phelps, 57 Wis. 425, 15 N. W. 385; Walker v. Denison, 86 Ill. 142. It

is not claimed that, at the time he executed the mortgage here involved, Arthur W. Gunther had been actually notified that his authority under the letter of attorney had been revoked, nor is it claimed that plaintiff had actual notice that the defendant Mary T. Gunther had taken any steps to revoke it. It is urged that the statutes providing that letters of attorney and other instruments containing a power to convey lands as agents or attorneys for the owner may be recorded in the [521] office of the register of deeds of the county wherein the lands to which they relate are situated, and that the authority granted by such a letter or other instrument shall not be deemed revoked by any act of the party who executed it unless the instrument containing such revocation be also recorded in the same office, are an abrogation of the common-law rule, and that the recording of an instrument of revocation in itself effects a termination of the agency and serves as a notice to all persons. This contention is, however, not justified by the terms of the recording statutes. The extent to which the recording of instruments, under the statutes, shall be deemed notice thereof is specified by these enactments, and they contain no provisions declaring expressly or by implication that the recording of these instruments shall be deemed an abrogation of the common-law rule which requires the giving of notice to terminate the authority granted by them. Section 2242 of the Statutes of 1898, defining what the term "conveyance," as affecting title to land, shall be construed to embrace, clearly indicates that a letter of attorney and an instrument revoking the authority conferred thereby are not included within the terms used in this chapter, and they can therefore not be affected by the provisions of the statutes which declare the effect of recording conveyances of real estate, and which were enacted for the purpose of protecting subsequent purchasers in good faith and for a valuable consideration: Fallass v. Pierce, 30 Wis. 443; Gilbert v. Jess, 31 Wis. 110; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614; Edwards v. McKernan, 55 Mich. 520, 22 N. W. 20; Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054.

The context of sections 2237, 2246, of the Statutes of 1898, providing that letters of attorney and other instruments containing powers to convey lands may be recorded as therein prescribed, and when so recorded shall not be deemed revoked by any act of the party who executed them unless the instru-

ment of revocation be also recorded in the same office, contains nothing to [522] the effect that such recording is necessary to give them validity, and it is not prescribed that the recording of the instrument of revocation shall take the place of the actual notice to the agent required at common law to terminate it. The case of Arnold v. Stevenson, 2 Nev. 234, is relied on as authority to the effect that the recording of the instrument of revocation operates, under the statute, as a notice to the agent and all persons dealing with him that the authority is terminated. The decision cannot serve as an authority for the construction of our statute, for the reason that the Nevada statute on the subject expressly provides that the recording of the instrument shall "import notice to all persons of the contents thereof," and, as above stated, our statute contains no such provision. It is manifest that, since the statute does not operate to give such notice, it is necessary to comply with all the requirements of the common law for revoking the authority granted by a letter of attorney or other instrument containing a power to convey land; but, when such instrument has been recorded, a common-law revocation shall be ineffectual unless the instrument of revocation shall also be recorded in the same office. Applying this rule to the facts of the case, we must hold that Arthur W. Gunther had power to execute the mortgage which plaintiff now seeks to foreclose, and that the judgment appealed from was properly awarded. No other question arises for consideration.

By the COURT. Judgment affirmed.

Mr. Chief Justice Cassaday dissented and expressed the opinion that under the provisions of the Wisconsin statutes cited in the principal opinion, the filing and recording of a revocation of a recorded power of attorney to mortgage or convey lands was sufficient to terminate it and make void all acts thereafter performed under its authority, though actual notice of such revocation was not given to the agent. In this connection he said:

"The only object of recording such instruments is to notify persons subsequently dealing with the attorney or agent as to the extent of his power or want of power. Thus it was held in New York at an early day, under similar statutes to the sections here involved, that: 'A party dealing with an agent or attorney is bound to know the extent of his power, and is bound to inspect the instrument conferring it, especially where there is but one transaction between them. . . . If, however, a power to convey is recorded, an instrument of revocation also recorded in the same county appears to be sufficient notice': Williams v. Birbeck, 1 Hoff. Ch. 359.

"To the same effect is the decision in Arnold v. Stevenson, 2 Nev. 234, 239, where that case is cited approvingly. True, the statute of Nevada is slightly different from ours in its wording; but in my judgment it is the same in substance. The text-writers seem to agree that the recording of such revocation pursuant to the requirement of a statute is constructive notice to all persons subsequently dealing with the attorney or agent. Thus it is said by Mr. Jones that: 'It is provided by statute in nearly all the states, though in somewhat varying terms, that a power of attorney to convey real estate must be executed, acknowledged and recorded in the same manner that conveyances are. In several states a power of attorney to convey is not deemed to be revoked until the instrument of revocation is deposited for record in the same office in which the power is recorded': 2 Jones on Real Property Conveyances, sec. 1022, citing statutes in many states.

"Another writer says: 'In some states the revocation of a power is required to be deposited for record in the proper office; and where the revocation is recorded according to the statute, the authority is terminated, although the agent has no actual notice': 1 Am. & Eng. Ency. of Law, 2d ed., 1221.

"Referring to such statutes Mr. Mechem says: 'These statutes commonly provide also that any instrument revoking such a power shall or may be recorded in the same office, and make such recording in either case constructive notice of the facts which the record discloses. Where such statutes prevail, the recording of a revocation of the agent's authority is notice to all who may subsequently have occasion to deal with him; and where the statute is imperative, the revocation cannot be given effect in any other way, unless by express notice': Mechem on Agency, sec. 229.

"The rule seems to be universal that 'the death of the principal terminates a power to convey, and a deed made by the attorney after such death is void even if he was ignorant of the fact of the death; though if the power be coupled with an interest, it survives and may be executed after the death of the donor': 2 Jones on Real Property Conveyances, sec. 1037."

REVOCATION OF POWER OF ATTORNEY.

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I. When Revocable, Generally.

A power of attorney not given to secure the payment of money nor coupled with an interest is revocable at pleasure. In other words, to impart an irrevocable quality to a power, as a result of legal principles alone, there must coexist with it an interest in the thing or estate to be disposed of or managed: Darrow v. St. George, 8 Colo. 592, 9 Pac. 791; Gilbert v. Holmes, 64 Ill. 548; Smith v. Dare, 89 Md. 47, 42 Atl. 909; Blackstone v. Buttermore, 53 Pa. St. 266; Brookshire v. Voncannon, 6 Ired. 231; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. Such a power of attorney may be revoked by the principal therein at any time before the act authorized by it has been accomplished, and it makes no difference whether such principal is an adult or an infant: Pickler v. State, 18 Ind. 266. Revocation of a mere naked power, in the execution of which an agent has no other interest than that which springs from his employment as agent, and his right to earn his compensation, may be made at any time at the pleasure of the principal as long as the authority under the power is not executed: Terwilliger v. Ontario etc. R. R. Co., 149 N. Y. 86, 43 N. E. 432.

A power of attorney may be revoked by the principal, notwithstanding it is in terms irrevocable, unless it is coupled with an interest in the agent, or is supported by a consideration, and the mere use of the word "irrevocable" in the power, when not thus coupled or supported, confers no greater power on the attorney than an ordinary power of attorney: Frink v. Roe, 70 Cal. 296, 11 Pac. 820; MacGregor v. Gardner, 14 Iowa, 326; Attrill v. Patterson, 58 Md. 226; Buffalo Land etc. Co. v. Strong, 91 Minn. 84, 97 N. W. 575.

As illustrations of the foregoing rules, it may be stated that a power to sell and convey land is a naked power not coupled with an interest, and may be revoked by the principal at any time before the sale is made: Brown v. Pforr, 38 Cal. 550; Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76; Green v. Cole, 103 Mo. 70, 15 S. W. 317. Under such a power the principal may at any time before sale revoke the agent's authority, even though the power expressly stipulates that his power to sell shall be exclusive: Woods v. Hart, 50 Neb. 497, 70 N. W. 53. If one is given a power to sell the lands of another, in consideration of one-half of the net proceeds of the sales, and there is no stipulation in the power as to its duration, the principal has the right to revoke it at any time: Coffin v. Landis, 46 Pa. St. 426. The fact that a power to sell land authorizes the agent to retain a percentage of the purchase money in payment for his services does not make it a power coupled with an interest, as the interest of the agent is only in the proceeds of the land arising from the execution of the power, and such a power of attorney is revocable at any time before sale: Hall v. Gambrill, 88 Fed. 709. An attorney in fact with power to sell real property has not a power coupled with an interest which renders the power irrevocable, unless the instrument containing the power gives him such an interest or estate in the land as will enable

him to execute the power in his own name: Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

A power of attorney to collect the rents from a farm on a certain commission may be revoked at the will of the principal, notwithstanding the fact that the agent has made advances under and upon the faith of it, the power not having been conferred as security for such advances, and the agent being under no legal obligation to make them: Smith v. Dare, 89 Md. 47, 42 Atl. 909. So a power of attorney to collect money for the principal, the attorney to receive as compensation one-half of the net proceeds, is not a power coupled with an interest, and is revocable: Hartley's Appeal, 53 Pa. St. 212, 91 Am. Dec. 207. An interest in the proceeds to arise as compensation for executing the power never makes it irrevocable, and a mere power is always revocable at will when it concerns the interest of the principal alone, even though there be an express declaration therein of irrevocability: Blackstone v. Buttermore, 53 Pa. St. 266.

A power of attorney to confess judgment in favor of a third person is revocable at the pleasure of the principal, unless it is supported by a consideration, or is held as security, or is necessary to effectuate a security: Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197. On the other hand, it has also been decided that a power of attorney to confess a judgment is not revocable by the act of the person giving it: Kindig v. March, 15 Ind. 248. An agent whose power of attorney to collect a judgment gives him an interest, not in the judgment itself, but in the proceeds when collected, has, in legal contemplation, no such power coupled with an interest as will preclude the principal from revoking the power and agency before the judgment is collected without remedy to such agent: Daugherty v. Moon, 59 Tex. 397.

If one, without consideration, intrusts an agent with money under a power to settle a lawsuit between two others, such power may be revoked at any time before the settlement is complete: Phillips v. Howell, 60 Ga. 411.

A power of attorney, coupled with an interest in the subject matter thereof, may be revoked by the principal in pursuance of a stipulation or reservation to that effect in the instrument constituting the agency or authority: Oregon etc. Bank v. American Mortgage Co., 13 Saw. 260, 35 Fed. 22.

II. When not Revocable, Generally.

It is everywhere conceded that when the authority given by a power of attorney is coupled with an interest, or is given for a valuable consideration, or is part of a security, the power is irrevocable whether so expressed or not: Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76; Buffalo Land etc. Co. v. Strong, 91 Minn. 84, 97 N. W. 575; Hilliard v. Beattie, 67 N. H. 571, 39 Atl. 897; Bergen v. Bennett, 1 Caines, 1, 2 Am. Dec. 281; Wheeler v. Knaggs, 8 Ohio, 169. But the interest which an attorney

in fact must have to render his power of attorney irrevocable must be an interest in the property on which the power is to be exercised, and not an interest in the money to be derived from an exercise of the power: Barr v. Schroeder, 32 Cal. 609; Attrill v. Patterson, 58 Md. 226; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Blackstone v. Buttermore, 53 Pa. St. 266; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. To constitute a power coupled with an interest which makes it irrevocable, the interest must be in the subject matter over or concerning which the power is to be exercised. An interest in that which is to be produced by the exercise of the power is not sufficient: Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Bonney v. Smith, 17 Ill. 531. A power coupled with an interest must create an interest in the thing itself upon which the power is to operate. The power and estate must be united or be coexistent in order to render the power irrevocable: Gilbert v. Holmes, 64 Ill. 548. A power coupled with an interest, as applied to a power of attorney, exists when the interest of the attorney is established in the subject on which the power is to operate. It does not exist when such interest is only in that which is to be produced by exercising the power: Daugherty v. Moon, 59 Tex. 397. If the power forms part of a contract and is a security for the performance of any act, it is irrevocable, whether expressly made so or not: Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. Thus, a power to sell personal property and receive the pay therefor, given by the owner to another person, may be irrevocable if it was given for a valuable consideration within the law applicable to executory contracts: Terwilliger v. Ontario etc. R. R. Co., 149 N. Y. 86, 43 N. E. 432. Or if a note is indorsed on the faith of an equitable pledge by the maker, of moneys earned by him under a contract with the state, but not yet due, a power of attorney authorizing the indorser to collect such money when it becomes payable is a power coupled with an interest, and not revocable: Hutchins v. Hebbard, 34 N. Y. 24.

If two persons are cultivating a crop in partnership, and one employs the other to finish the work and harvest the crop, empowering him to sell the interest of the one executing the power, pay himself out of the proceeds for his labor in completing the crop, and also a debt due him from the other, this is a power coupled with an interest, and cannot be revoked: Allen v. Davis, 13 Ark. 28. Or if a principal expressly gives a power to collect debts for the purpose of providing the means to return advances made by the agent, such power is irrevocable: Marzion v. Pioche, 8 Cal. 522.

A power to sell and convey property and pay the proceeds to a creditor of the person executing such power, accepted by the creditor as security for his debt, is irrevocable: American Loan etc. Co. v. Billings, 58 Minn. 187, 59 N. W. 998.

A power of attorney made upon a good and valuable consideration which, together with the agreement under which it is executed, operates to vest an interest in the attorney in a claim and suit, cannot be revoked by the person giving such power without satisfying his part of the agreement: Stewart v. Hilton, 19 Blatchf. 290, 7 Fed. 562.

A power of attorney which gives to the agent a veto upon the acts of his principal is equivalent to a power coupled with an interest, and is not revocable: Day v. Candee, Fed. Cas. No. 3676.

A power given by a principal which provides that a patent applied for by him shall, when issued, inure to the benefit of others, is equivalent to an assignment of the patent, and hence is a power coupled with an interest and not revocable: Day v. Candee, Fed. Cas. No. 3676.

In Montague v. McCarroll, 15 Utah, 318, 49 Pac. 418, it appeared that plaintiff's grantor received from the owner of lands an irrevocable power of attorney for a consideration of five dollars to enter upon, take possession of such land, and to grant, bargain, sell and convey such land to a purchaser, and deliver a deed of conveyance thereof. The maker of the power forever renounced all right to revoke such power, or to appoint any other person to execute or revoke such power, and also renounced all right on his part to do what the attorney was authorized to do, and released to such attorney all claims to any proceeds of the lands when sold, ratifying all acts of the attorney in conveying and in retaining the proceeds of the lands when sold. Before the conveyance of the land by the attorney to the plaintiff, the principal attempted to revoke such power, and the land was sold to the defendant's grantor. Under this state of facts the court decided that the plaintiff's grantor had the right to convey the land under his power of attorney which was given for a valuable consideration, coupled with an interest, and was irrevocable.

III. Death of Principal.

The death of the maker works an immediate revocation of a simple power of attorney: Saltmarsh v. Smith, 32 Ala. 404; Easton v. Ellis, Handy (Ohio), 70; Estate of Kern, 176 Pa. St. 373, 35 Atl. 231; Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 11; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. Death works a revocation of a simple power of attorney, and vests the title of the decedent in his executor or administrator: Estate of Kern, 176 Pa. St. 373, 35 Atl. 231. The death of the principal operates as an instantaneous revocation where the power of attorney is a naked power unaccompanied with an interest, or, in other words, the death of the principal revokes a power of attorney, except when the power is coupled with an interest in the thing actually vested in the agent: Travers v. Crane, 15 Cal. 12; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Clayton v. Merrett, 52 Miss. 353; Farmers' Loan etc. Co. v. Wilson, 139 N. Y. 284, 36 Am. St. Rep. 696, 34 N. E. 784; Brown v. Skotland, 12 N. Dak. 445, 97 N. W. 543; Primm v. Stewart, 7 Tex. 178; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. The death of a principal is a revocation of a power, even though, in express terms, it is declared to be irrevocable, unless the power is coupled with an interest, not in the thing to be obtained by such power, but in the estate itself:

Yeates v. Pryor, 11 Ark. 58; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589. A power to execute a conveyance of land is revoked by the death of the principal: Nehring v. McMurrain (Tex. Civ. App.), 45 S. W. 1032. A power of attorney to sue for property, the attorney to receive part thereof in case of recovery, is not a power coupled with an interest, and the death of the principal terminates the agency: Wainright v. Massenberg, 129 N. C. 46, 39 S. E. 725. So a power given to a surety for the special purpose of making sale of a tract of land at a certain price, and applying the proceeds to the payment of the debt of the principal is revoked by his death: Huston's Admr. v. Cantril, 11 Leigh, 136. Where there is merely a power given to a creditor to receive a debt expressly for the purpose of liquidating the claim of the creditor, but unaccompanied by an actual assignment, or by any security to which the power might have been ancillary, it is revoked by the death of the principal: Houghtaling v. Marvin, 7 Barb. 412.

a. **Effect of Death on Subsequent Act of Attorney.**—When a power of attorney is not coupled with an interest, it is revoked by the death of the principal, and such revocation takes effect at once. Any subsequent act done under the power, though without notice of the principal's death, is void so far as his estate is concerned: Clayton v. Merrett, 52 Miss. 353; Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 12. Undoubtedly a deed made by an attorney in fact to convey land for his principal, such deed being made in the principal's name after the attorney has knowledge of his death, is void: Green v. Tuttle, 5 Ariz. 179, 48 Pac. 1009. And the death of the principal operates as a revocation of a power of attorney to convey land, not coupled with an interest therein, and if, after such death, the attorney makes a deed under the power, such deed is void, even if the attorney is ignorant of the death: Ferris v. Irving, 28 Cal. 645; Vance v. Anderson, 39 Iowa, 426; McClaskey v. Barr, 50 Fed. 712; Pacific Bank v. Hannah, 90 Fed. 72, 32 C. C. A. 522. A power authorizing one to "bring suit for, settle up, compromise, release, obtain, or recover the interest owned" by the principal in certain lands, is revoked by his death, and any act thereafter done under such power is void: Connor v. Parsons (Tex. Civ. App.), 30 S. W. 83. A power given to a person to collect and receive payment upon securities belonging to the principal, when not coupled with an interest, ceases upon the death of the principal, and payment thereafter made to the attorney in fact does not bind the estate of the principal, although the payor was not aware of the death at the time of making the payment; nor does the fact that the attorney, at the time of the payment, held the securities affect the rights of the estate of the principal: Weber v. Bridgman, 113 N. Y. 600, 21 N. E. 985. A power given to a person to collect and receive rents falling due to the principal ceases upon the death of the latter, unless the power is coupled with an interest, and payment made thereafter to the agent, in ignorance of the death of the prin-

cipal, does not bind his estate: Farmers' Loan etc. Co. v. Wilson, 139 N. Y. 284, 36 Am. St. Rep. 696, 34 N. E. 784. The recital in a power of attorney of the specific purpose for which it is given, to wit, to collect a debt due the constituent, and with the proceeds pay an obligation of his, does not affect its character as a naked power, nor presently devest or invest an interest in the fund, and the collection of the debt by the attorney after the death of the principal, and the application of the proceeds to the payment of such debt, does not release the principal's debtor from subsequently being compelled to pay the amount to the principal's administrator: Garber v. Myers, 32 Ill. App. 175.

b. Effect of Death When Power is Coupled with Interest.—A power of attorney coupled with an interest does not expire with the death of the person creating it, but survives him and may be executed after his death: Roland v. Coleman, 76 Ga. 652; Frederick's Appeal, 52 Pa. St. 338, 91 Am. Dec. 159, 162; Hennessee v. Johnson, 13 Tex. Civ. App. 530, 36 S. W. 774; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 581. The general rule is that the death of the principal puts an end to the agency, and no act of the agent subsequently thereto is binding on the estate of the principal. But there is a well-settled exception to this rule, and it is that where the power is coupled with an interest in the subject matter of the agency, the agent may execute the authority after the death of the principal: Durbrow v. Eppens, 65 N. J. L. 10, 46 Atl. 582. The interest which will authorize the execution of a power, after the death of the principal, must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing: Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Morgan v. Gibson, 42 Mo. App. 234; Houghtaling v. Marvin, 7 Barb. 412. In Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 581, it was said that "the interest or title in the thing, being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate being in him passes from him by a conveyance in his own name. He is no longer a substitute, acting in the name or place of another, but is a principal acting in his own name in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded." Hence the doctrine is firmly established that a power to sell, coupled with an interest in the thing to be sold, survives the grantor of the

power; otherwise where the interest is in the proceeds only of the thing to be sold: Hawley v. Smith, 45 Ind. 183. If the power forms part of the contract and is security for money or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and if not so, is deemed irrevocable in law, and the power may be exercised at any time, and is not revoked by the death of the person who created it: Durbrow v. Eppens, 65 N. J. L. 10, 46 Atl. 582. Thus, if a person pays or advances money to another and takes an order from a third person, as security for the sum so paid or advanced, to that amount the order will operate to transfer the fund, and will become a power coupled with an interest, which is not revoked by the death of the drawer: Houghtaling v. Marvin, 7 Barb. 412. A power to an agent to sell goods, and out of the proceeds pay certain lien and other claims, and apply the balance, first to the payment of certain notes he held against the principal and return the overplus to him, is not revoked or extinguished by the death of such principal, and the agent has the right to sell thereafter and apply the proceeds as agreed, even to the payment of his own notes in full, though the estate is rendered insolvent thereby: Merry v. Lynch, 68 Me. 94. A power of attorney authorizing the agent to collect the rents from mortgaged premises and apply them on the mortgage, and assigning the rents, not only from the leases then in existence, but from those thereafter to be made, as security for the mortgage debt until it should be fully paid, is coupled with an interest and not revoked by the death of the mortgagor who executed the power: Kelly v. Bowerman, 113 Mich. 446, 71 N. W. 836.

c. **Death of Joint Principal.**—A power of attorney given by three persons to sell and convey land, is, by the death of two of them, revoked, at least as to the two dying and their heirs and assigns: Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. Rep. 147, 30 L. ed. 396. But an agreement by a firm making a certain person their attorney in fact to demand and receive certain claims of the firm, and providing that he shall be entitled to a certain per cent of the amount collected, is not such a pow r as is revoked by the death of the members of the firm, and such deaths in no way affect the right of the attorney in fact to go on and complete his contract: Matter of Grapel v. Hodges, 49 Hun, 107, 1 N. Y. Supp. 823. An authority delegated to an attorney in fact from three trustees having a power coupled with an interest, and from the survivor and survivors of them to sell and convey lands, is not revoked by the death of one of the trustees. Such delegation, if joint and severable, invests the attorney with full power of the surviv'ng trustees, so as to enable him to pass both the beneficial and the legal estate: Wilson v. Stewart, 5 Clark (Pa.), 450, 3 Phila. 51.

IV. Marriage of the Principal.

A power given by a feme sole is revoked by her marriage: Montague v. Carneal, 1 A. K. Marsh. 351. If a woman gives a power of at-

torney to convey her land, and then marries, the marriage operates as a revocation of the power, at least as to all persons having knowledge of the marriage: Wambole v. Foote, 2 Dak. 1, 2 N. W. 239. The marriage of a woman revokes a power given to an agent to lease her lands, and a lease thereafter executed by him under the power is void: Brown v. Miller, 46 Mo. App. 1. Though a power of attorney given to the manager of an estate by the joint owners may have been revoked by the death of one, and the marriage of another, if he continues to act under the power, for the benefit of such principals, without any express disavowal of his authority, or if he is subsequently recognized as such attorney, either tacitly or expressly, the principals will be bound by his acts: Reynolds v. Rowley, 3 Rob. 201, 38 Am. Dec. 233.

Marriage does not, as we understand it, impose any disability upon the man, and hence we must infer, though we know of no case in which the question has been necessarily determined, that marriage does not revoke a power of attorney previously executed by the husband: Joseph v. Fisher, 122 Ind. 399, 23 N. E. 856. An antenuptial power of attorney, coupled with an interest and under which no action has been taken prior to the marriage, cannot, by any act subsequently performed under it, devest the wife of any right or estate of which the husband had not the power by his direct action to devest her. Hence, if before the marriage he had a single man's homestead in which, by virtue of the marriage, she acquired some right, such right cannot be subsequently impaired by a conveyance executed under authority of the husband's antenuptial power of attorney: Henderson v. Ford, 46 Tex. 627.

V. Insanity of Principal.

In some cases the broad statement is made that the authority conferred by a power of attorney is suspended by the subsequent insanity of the person who gives the power: Renfro v. City of Waco (Tex. Civ. App.), 33 S. W. 766; Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2133. On the other hand, it has been also stated that the lunacy of a person who has executed a power of attorney does not operate to revoke it, at least, until the fact of his lunacy has been properly established by an inquisition: Wallis v. Manhattan Co., 2 Hall, 495. The above decisions do not truly state the law, because the principle that insanity operates as a revocation of a power of attorney cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent: Davis v. Lane, 10 N. H. 156. Or, if the power is such that it could not be revoked by the principal if he had continued sane, it is not revoked by his insanity: Spencer v. Reynolds, 9 Pa. Co. Ct. Rep. 249. And if the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, and the incapacity of the principal by reason of his insanity is not known to those who deal with the agent within the scope of the authority, which he seems to possess, the

principal and those who claim under him may be precluded from setting up the insanity as a revocation: Davis v. Lane, 10 N. H. 156.

It is true, however, that a principal's insanity revokes the authority of his agent under a power of attorney, except in cases where a consideration has been previously advanced, so that the power has become coupled with an interest, or where a consideration of value is given by a third person trusting to an apparent authority and in ignorance of the principal's incapacity: Hill's Exrs. v. Day, 34 N. J. Eq. 150; Matthiessen v. McMahon's Admr., 38 N. J. L. 536. The fact that one is put under guardianship for insanity does not warrant a court in holding that a power previously created by him is thereby terminated, unless it also appears that the insanity was of that character which disqualified him from entering into a valid contract: Motley v. Head, 43 Vt. 633.

VI. Acts Which Work Revocation.

The demand by the principal for the return of a written power under which an attorney in fact is acting, and its surrender and withdrawal without any explanatory words or further instructions is a revocation of the power: Kelly v. Brennan, 55 N. J. Eq. 423, 37 Atl. 137. The appointment of a second attorney in fact to collect a debt is the revocation of a pre-existing power for the same purpose, especially as to persons who have knowledge of the second appointment: Williamson v. Richardson, Fed. Cas. No. 17,754. But not in all cases is a revocation for a power necessarily implied from a subsequent power to another to do the same thing. When the second power is not absolutely inconsistent with the first, the question whether it was intended to revoke the other must be determined by the circumstances of the case: Starr v. Stark, 2 Saw. 603, Fed. Cas. No. 13,317; Stark v. Starr, 94 U. S. 477, 24 L. ed. 276. A power of attorney, though under seal, may be and is revoked by an act in parol evincing an intention to that effect: Brookshire v. Brookshire, 8 Ired. 74, 47 Am. Dec. 341. As the power of constituting an agent is founded upon the right of the principal to do business himself, it follows that when that right ceases, the right of creating an appointment or continuing it must cease also. Thus if the principal has parted with his right in the subject matter of the agency before the attorney in fact has exercised the power, it will be a revocation in law of the power conferred: Gilbert v. Holmes, 64 Ill. 548. Or if a principal who has given a power of attorney to sell himself sells and disposes of the thing before a sale by the person holding the power, this is a revocation of the power by operation of law: Walker v. Denison, 86 Ill. 142. A power to sell real property and apply the proceeds in a particular way is necessarily revoked by an assignment by the principal for the benefit of his creditors before the exercise the power: Barrett v. His Creditors, 12 Rob. (La.) 474.

If a power of attorney is given to conduct all of the principal's business at a particular place, and subsequently most of his property there is leased to the attorney for a long term, while this does not

entirely revoke the power, it modifies and limits it to the property, and interest, and business still retained by the principal: Perkins v. Currier, 3 Wood & M. 69, Fed. Cas. No. 10,985.

If joint principals appoint an agent under power of attorney to take charge of a matter in which they are jointly interested, a severance of their joint interests afterward, and before the power is acted upon revokes it: Rowe v. Rand, 111 Ind. 206, 72 N. E. 377.

After a suit is commenced to set aside a conveyance made by an agent under a power of attorney, on the ground that the power was obtained by fraud and misrepresentation, to which suit the agent and purchaser are made parties, an agreement between them modifying the agreement under which the conveyance was made confers no right on the purchaser as the commencement of the suit revoked the agent's power: Hatch v. Ferguson, 6 Fed. 668, 14 C. C. A. 41. A power of attorney executed by the widow and heirs of a decedent, is not revoked by a grant of administr tion to the widow two days after the execution of the power, and payments thereafter made to the agent under the power are valid: Jones' Admr. v. Commercial Bank, 78 Ky. 413.

A good and sufficient power of attorney to convey land executed by a married woman in one of the northern states before the commencement of the Civil War is not revoked by the fact that when such war broke out she and her husband removed to a southern state, where he entered the Confederate service, and where his wife resided up to the time of the close of such war: Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. Rep. 279, 42 L. ed. 658.

VII. Notice of Revocation.

Revocation of a power of attorney can be effected only by notice to the agent. Notice to a third person without notice to the agent leaves the power in force: Weile v. United States, 7 Ct. of Cl. 535. And a conveyance made by virtue of a power of attorney will be good, notwithstanding the previous revocation of the power, unless it is shown that the purchaser had notice of the revocation: Hancock v. Byrne, 5 Dana, 513.

After the revocation of the attorney's authority the principal is not bound, as between himself and the agent, to notify the latter of his dissent to acts done by such agent in pursuance of the original power: Kelly v. Phelps, 57 Wis. 425, 15 N. W. 385. If a power of attorney to convey lands and commence suits is not required to be recorded, then a revocation of such power is not required to be recorded to impart notice of revocation: Bust v. Van Ness, 12 Vt. 83. But a recorded power of attorney remains in force, when it grants power to convey lands as to a purchaser in good faith, without notice from the attorney, though the grantor himself in the meantime conveys the same lands by a deed which remains unrecorded. As to such purchaser, the power is not revoked until the revocation of the power is recorded or until the deed made by the principal is recorded: Gratz v. Land etc. Improvement Co., 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393. The deposit for record of a revocation of a power of

attorney in the proper office operates as a notice to all persons dealing with the attorney, and by such deposit the revocation becomes absolute without actual notice to the attorney: Arnold v. Stevenson, 2 Nev. 234; but this view, while to us it seems correct, conflicts with the principal case and the authorities cited therein.

The revocation of a power of attorney becomes operative, as to the agent, from the time it is actually known to him, and if by letter, from the time the letter is received, and not from the time it was mailed: Robertson v. Cloud, 47 Miss. 208.

JORDAN v. CHICAGO AND NORTHWESTERN RAILROAD COMPANY.

[125 Wis. 581, 104 N. W. 803.]

EXECUTORS AND ADMINISTRATORS — Appointment of Public Administrator Without Notice.—Under a statute providing that "when any person shall die intestate, leaving property in this state, but leaving no widow, surviving husband, or next of kin," the county court having jurisdiction may, upon its own motion, or upon the application of the public administrator, grant administration of such estate, the appointment of the public administrator may properly be made without notice. (p. 866.)

JUDGMENTS—Estates of Decedents—Collateral Attack.—Under a statute providing that when any person shall die intestate leaving property within the state, but leaving no widow, surviving husband, or next of kin, the county court having jurisdiction shall grant administration to the public administrator, such court, on petition filed for the appointment, has jurisdiction to determine whether the deceased leaves any property within the state, and its determination cannot be collaterally attacked. (p. 867.)

JUDGMENTS—Collateral Attack—Estates of Decedents.—A county court, upon petition filed for administration, upon an intestate's estate, has jurisdiction to determine whether the deceased left any property within the state, and having such jurisdiction of the subject matter in such proceeding in rem, its determination cannot properly be treated as a nullity, nor is it open to collateral attack, even if erroneous. (p. 868.)

E. M. Hyzer, for the appellant.

J. B. Wellman, R. V. Baker and N. L. Baker, for the respondent.

586 CASSODAY, C. J. Under the stipulation entered into on the trial, the only question here for consideration is whether the plaintiff was lawfully appointed administrator of the estate of the deceased and had the legal right to bring this action. There is no claim that the plaintiff should have been appointed such administrator by reason of being one of the persons referred to in section 3807 of the Statutes of 1898,

nor that the notice prescribed in section 3808 of the statutes was ever given. The plaintiff claims, and the trial court in effect found, that the appointment was properly and regularly made by the county court upon a sufficient petition under section 3819 of the Statutes of 1898. Omitting words not applicable here, that section declares that: "When any person shall die intestate, leaving property in this state, but leaving no widow, surviving husband or next [587] of kin, known to the county court, living therein the county court having jurisdiction of such estates shall, upon its own motion or upon the application of the public administrator, if such court shall deem necessary, grant administration of such estate to the public administrator, and it shall thereupon be lawful for the public administrator to take possession of the property and effects of the intestate and protect and preserve the same and to proceed with the administration of such estate and with the care and management of the estate, ... until administration thereon shall, upon proper application of some person entitled to apply therefor, be granted to some other person. If such intestate be a nonresident, administration of his estate shall be granted to the public administrator of the county where the property may be found."

And then, after providing for the revocation of the appointment of such public administrator, the section provides that "such estates shall be administered by the public administrator in the same manner as other estates, except as otherwise provided herein": Stats. 1898, sec. 3819. As held by this court, this section "obviously provides merely for a temporary situation, and authorizes appointment of the public administrator only until those having lawful right under section 3807 shall make proper application": Welsh v. Manwaring, 120 Wis. 377, 98 N. W. 214. As indicated, "the county court having jurisdiction of such estate" may, "upon its own motion or upon the application of the public administrator, ... grant administration of such estate to the public administrator." Of course, such appointment may properly be made without notice.

The contention is that the county court had no jurisdiction to make such appointment, because the intestate did not die "leaving property in this state." In other words, it is claimed that it appears from the evidence taken that the intestate left no real estate in Wisconsin, and that, in the absence

of an estate therein, the county court had no jurisdiction to make the appointment. The records of such appointment by the county court are in evidence; but there is no indication 588 that such appointment was ever set aside by the county court or any appeal taken therefrom to the circuit court. But counsel for the defendant contends that the authority of the county court to make such appointment is open to collateral attack for want of jurisdiction by reason of the absence of any estate in Wisconsin left by the intestate. In support of such contention counsel cite the decisions of this court holding that "the only jurisdiction which the county court has in respect to the administration of estates is over those of dead persons": Melia v. Simmons, 45 Wis. 334, 30 Am. Rep. 746; Wisconsin T. Co. v. Wisconsin etc. Ins. Co. Bank, 105 Wis. 464, 81 N. W. 642. See, also, D'Arusment v. Jones, 4 Lea, 251, 40 Am. Rep. 12; Thomas v. People, 107 Ill. 517, 47 Am. Rep. 458; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896; Cunnius v. Reading School Dist., 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125. The distinction between such a case and the one at bar is pointed out by Marshall, C. J., in an early case, and expressly sanctioned by some of the cases above cited: Griffith v. Frazier, 8 Cranch, 9, 23, 3 L. ed. 471. It is there said: "In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary [having the power of our county court], and, though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

This court, following the highest courts of England, has held, on direct appeal from the county court, that an order or judgment of a Louisiana court appointing an administrator of the estate of a deceased person, though based on a petition 589 alleging that the deceased died while a resident of that state leaving property therein, was not conclusive as to the domicile of the deceased and did not preclude a court of this

state from taking jurisdiction of proceedings to probate the will of the deceased and administer so much of his estate as was actually located in Wisconsin: Frame v. Thormann, 102 Wis 653, 79 N. W. 39; Thormann v. Frame, 176 U. S. 350, 356, 20 Sup. Ct. Rep. 446, 44 L. ed. 500; De Mora v. Concha, 29 Ch. D. 268, affirmed L. R. 11 App. Cas. 541. See, also, Overby v. Gordon, 177 U. S. 214, 20 Sup Ct. Rep. 603, 44 L. ed. 741. Of course, it frequently occurs that an intestate person leaves property located in different states. Where that is the case there can be no doubt that the appropriate court of each state where such property is located may, upon proper proceedings being had, grant letters of administration of so much of the estate as is therein located.

The question here presented is whether the appointment of the plaintiff as administrator by the county court is open to collateral attack. The county court, upon petition filed, certainly had jurisdiction to determine whether the deceased left any property in the state of Wisconsin. Having such jurisdiction of the subject matter in such proceeding in rem, its determination could not properly be treated as a nullity nor be open to collateral attack: Van Fleet on Collateral Attack, secs. 527, 573, and cases there cited. In the last of these sections it is said that "the statutes concerning the appointment of administrators authorize it to be made in certain cases in any county where the decedent left assets. On the presentation of a petition asking for an appointment in such a case, it becomes a question of fact, to be determined from the evidence, whether or not the decedent did leave assets in that county, and an erroneous decision is conclusive in a collateral proceeding": See 11 Am. & Eng. Ency. of Law, 2d ed, 785; Pick v. Strong, 26 Minn. 303, 3 N. W. 697; McCooey v. New York etc. R. Co., 182 Mass. 205, 65 N. E. 62; [590] O'Connor v. Huggins, 113 N. Y. 511, 21 N. E. 184; Johnson v. Johnson's Estate, 66 Mich. 525, 33 N. W. 413; Brawford v. Wolfe, 103 Mo. 391, 15 S. W. 426; Dunn v. German-American Bank, 109 Mo. 90, 18 S. W. 1139. In this last case it was expressly held that "the right of a public administrator to take charge of an estate cannot be collaterally questioned." To the same effect: Hoes v. New York etc. R. Co., 73 App. Div. 363, 77 N. Y. Supp. 117. In so far as this court has spoken on similar subjects of jurisdiction the same is in harmony with the authorities cited: Tallman v. McCarty, 11 Wis. 401; Portz v. Schantz, 70 Wis. 497, 36 N. W. 249; Swan v. Nor-

vell, 107 Wis. 625, 83 N. W. 934. We must hold that the appointment of the plaintiff as such administrator was conclusive on the defendant in this action. Besides, the evidence is sufficient to support the finding that the deceased left property and an estate within Kenosha county to be administered therein.

By the COURT. The judgment of the circuit court is affirmed.

Mr. Justice Dodge Concurred in part and dissented in part. He said: "Upon the ground that the evidence shows that the decedent had property in Kenosha county, I concur in the affirmance of the judgment, but I cannot yield assent to the doctrine that the exercise of jurisdiction to appoint an administrator by the county court concludes all collateral inquiry as to whether it had jurisdiction to do so. To so hold is to adopt the sophistry which was exploded by Paine, J., with such dignity of ridicule in Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269, adopting the views expressed in Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172.

"Where the very existence of a fact is essential to the power of a court to consider a matter, that it cannot have such power to consider when the fact does not exist seems an axiom. To concede the necessity of existence of the fact as a condition to the court's deciding at all, and then to hold that, though it does not exist, yet the court's decision that it does in effect creates the fact, is magic. It endows courts with omnipotence. It creates something out of nothing. It sanctions the logic of the man who would lift himself by pulling on his own boot straps. The power of the state of Wisconsin to exercise any control, either by its courts or other branches of government, over the property left by a decedent, must depend on either the fact of his residence here or the presence of effects within the state: Moyer v. Koontz, 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cunnius v. Reading School Dist., 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125. In absence of those facts, it cannot confer on anyone authority to meddle with such decedent's property, to take it into possession, sell it, or give it away. The acts of one so attempted to be authorized must be entirely futile and ineffective whenever questioned by the government having lawful jurisdiction over such property or by its administrative agents. Hence the payment of money to one appointed administrator without jurisdiction will not protect appellant against an administrator duly appointed. So I cannot doubt that appellant had right to question whether plaintiff was administrator at all.

"That a jurisdictional fact must actually exist before any decision of a court can be conclusive has been declared repeatedly by this court; and the illogic of those courts, some of which are cited in the majority opinion, which hold that a finding that such fact

exists suffices, has been reviewed and repudiated: Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Pollard v. Wegener, 13 Wis. 569; Carr v. Commercial Bank, 16 Wis. 50, 52; St. Sure v. Lindsfelt, 82 Wis. 346, 33 Am. St. Rep. 50, 19 L. R. A. 515, 52 N. W. 308; Toepfer v. Lampert, 102 Wis. 465, 469, 78 N. W. 779; Johnson v. Turnell, 113 Wis. 468, 472, 89 N. W. 515."

Collateral Attack upon the right of an acting administrator, on the ground that the decedent was a nonresident or left no property in the county, is discussed in the monographic note to Dobler v. Strobel, 81 Am. St. Rep. 548-557; and in the subsequent cases of Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299; Dunlap v. Savings Bank, 69 S. C. 270, 104 Am. St. Rep. 796.

KOELZER v. FIRST NATIONAL BANK.

[125 Wis. 595, 104 N. W. 838.]

BANKS AND BANKING—Usage and Custom.—The general custom in banking business is to pay an account of a depositor, carried on the bank's books in open account subject to check, only upon a proper demand therefor by check or its equivalent at the banking-house during ordinary banking hours, and one who deposits money for his credit in such an account, without any special understanding to the contrary, is presumed to accept the undertaking of the bank to pay according to the general usage in such cases, and such is the contract between the bank and its general depositors by necessary implication. (p. 871.)

BANKS AND BANKING—Statute of Limitations—Demand for Deposit.—An action will not lie against a bank for a general deposit until after a demand has been made therefor by check or otherwise, and until then the statute of limitations does not begin to run against the bank. (p. 872.)

J. H. Page and W. Smith, for the appellant.

J. G. Kestol and Whitehead & Matheson, for the respondent.

597 MARSHALL, J. The learned circuit court seems to have applied to the facts of this case the doctrine which prevailed in Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705. The question there was this: Is a demand for payment of a bank's written obligation in the form of an ordinary certificate of deposit essential to a cause of action to recover thereon? For the reason that the relations of the parties to such an instrument are those of debtor and creditor, and all its characteristics are identical with those of a promissory note payable on demand, it was held to be such a note

and to be governed by the law relating to such contracts as regards necessity for demand for payment as a condition precedent to action thereon. That is, since in contemplation of law a promissory note payable on demand is due from its date and affected by the statute of limitations from that time, such a note payable by a bank, though called a certificate of deposit, must be governed accordingly. That is well supported by judicial authority, though there is much authority to the contrary, mainly based on the theory that the relation between a bank and its depositor is not that of debtor and creditor but more like that of bailee and bailor. Obviously since the rule as to a certificate of deposit is grounded on the fact that it is a mere promissory note payable on demand, it does not necessarily apply to ordinary indebtedness of a bank to a depositor carried on its books in open account subject to check.

598 If such indebtedness as the last mentioned were of the same character as that on an ordinary account one would be governed by the same rule as the other as regards the statute of limitations. A cause of action to recover thereon would not be dependent upon a formal demand for payment. Manifestly it is not of the same character. In case of an ordinary account it is the legal right of the creditor to have his debtor seek him out and pay him. There is no such obligation as to a bank creditor. The general custom in banking business is to pay on account of such indebtedness only upon a proper demand therefor by check or its equivalent at the banking house during ordinary banking hours. One who deposits money for his credit in such an account, without any special understanding to the contrary, is presumed to accept the undertaking of the bank to pay according to the general usage in such cases, which is known to all men. There being such a general custom, without some special stipulation to the contrary, the contract between the bank and its general depositors, by necessary implication, accords therewith. So a breach of the bank's obligation to pay upon a proper demand being made, or some act on the part of the bank dispensing with such demand, is essential to a cause of action to recover of it and set the statute of limitations running in respect to the debt.

The judicial and elementary authorities are in substantial harmony with the result reached. In Wood on Limitations, third edition, section 17, the trend of American decisions is

stated in these words: "But it appears to be that an action will not lie against a bank for a deposit until after a demand has been made therefor. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be requested at the banking-house, and therefore it is not in default or to respond in damages until demand and refusal; nor does the statute of limitations begin to run until demand has been duly made."

599 The texts in 1 Morse on Banks and Banking, fourth edition, section 322, and 3 American and English Encyclopedia of Law, second edition, 838, supported by numerous authorities, are to the same effect.

It is suggested by counsel for respondent that as this court has held that the relation between a bank and its depositor is that of debtor and creditor, and that no demand for payment of its ordinary certificate of deposit is essential to a cause of action to recover thereon, it must necessarily follow that the same rule applies to an ordinary indebtedness on open account, as in all jurisdictions the rule is uniform as to both classes of indebtedness. Counsel are in error in that. True, many courts hold contrary to the policy adopted here as to a demand being necessary to a cause of action on certificates of deposit. True, in such jurisdictions there is no distinction between indebtedness on such a certificate and indebtedness on open account, but in every jurisdiction, so far as we can discover, where it has been held that the statute of limitations on such a certificate runs from its date, and the question has been determined as to when it runs as to an ordinary bank credit subject to check, it has been held that a demand for payment is necessary to set such statute in operation. As significant in that regard as any of the American decisions are these of the supreme court of Minnesota, since the rule there is that the relation between a bank and its depositors is that of debtor and creditor: Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910. See, also, 1 Morse on Banks and Banking, 4th ed., secs. 302, 322.

We do not overlook the fact that the account in question, as is usual, was an open account current and that it is provided by statute that "in actions brought to recover the balance due upon a mutual and open account current the cause of action shall be deemed to have accrued at the time of the last item proved in such account": Stats. 1898, sec. 4226.

That does not apply where by agreement between the parties [600] the debt is payable only upon the happening of some particular event. Mere bank credits are an exception to accounts in general referred to in the statute, since, as stated, demand for payment at the banking-house during banking hours is essential to put the bank in default. Section 4226 of the Statutes of 1898 does not, but subdivision 3, section 4222 of the Statutes of 1898 does, cover such cases as the one before us, it being understood that the statute commences to operate only from the time the cause of action is complete.

By the COURT. The judgment is reversed, and the cause remanded with directions to render judgment in favor of plaintiff for five hundred and thirty-three dollars and twenty-six cents, with interest thereon from the fifth day of February, 1898, with costs.

The Statute of Limitations does not generally begin to run against a deposit in a bank until demand is made and payment refused: Girard Bank v. Bank of Penn Township, 39 Pa. St. 92, 80 Am. Dec. 507; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 30 Am. St. Rep. 159. As to whether the statute commences to run on a certificate of deposit before a demand is made, see Tobin v. McKinney, 14 S. Dak. 52, 91 Am. St. Rep. 694; Mereness v. First Nat. Bank, 112 Iowa, 11, 84 Am. St. Rep. 318.

PRITCHARD v. LEWIS.

[125 Wis. 604, 104 N. W. 989.]

DEEDS—Construction—Exception and Reservation.—A deed which expressly excepts and reserves "a strip of land two rods in width off the north side thereof" plainly imports that the fee was intended to be reserved. (p. 874.)

DEEDS — Construction—"Reservation"—"Exception."—The term "reservation" as used in a deed means something taken back from the thing granted, while the term "exception," when so used, means some part of the estate not granted. (p. 874.)

DEEDS — Construction — Reservation—Exception.—A reservation in a deed for a right of way carries only an easement, while an exception for the same purpose excludes the fee from the grant. (p. 876.)

DEEDS—Construction—Exception or Reservation—Evidence to Determine.—If, from the words of a deed, it is doubtful whether it creates an exception or a reservation, that question is one largely of intention to be determined by the court from the nature and effect of the provision itself, the subject matter and the situation of the parties, and evidence is admissible to aid the court in removing any existing ambiguity. (p. 877.)

DEEDS—Exception—Adverse Possession.—If all of a tract of land is granted "excepting" a strip containing one acre for a right of way for another, with the privilege in the grantee to fence such one acre into his inclosure and maintain gates, the occupation of the whole tract by a subsequent grantee in partition under a deed conveying and describing the property by metes and bounds and including the whole tract is not adverse as to the one acre strip inclosed with the remainder of the tract. (p. 878.)

CLOUD ON TITLE—Mortgages.—A mortgage including land not owned by the mortgagee is a cloud on the title of the owner of such land. (p. 879.)

W. W. Rowlands, for the appellant.

D. H. Flett, for the respondents.

[610] KERWIN, J. 1. The first and important question for consideration is, What title passed by the deed of November 11, 1872, from Evan Jones and wife to Owen P. Pritchard? The two deeds from Jones to Lewis and Pritchard upon their face indicate that they were executed upon the same day. The deed to Lewis in plain terms excepts and reserves the two rods for a right of way, not a right of way over the two rods, but "a strip of land two rods in width off the north side thereof, to be used as a right of way," which quite plainly imports that the fee was intended to be reserved: City of Cincinnati v. Lessee of Newell's Heirs, 7 Ohio St. 37. The language used is in form an exception and reservation. A marked distinction exists between the terms "exception" and "reservation" as used in deeds; the distinction being that a reservation is something taken back from the thing granted, while an exception is some part of the estate not granted at all: Rich v. Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Fischer v. Laack, 76 Wis. 313, 45 N. W. 104. True, the terms "excepting" and "reserving" are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception, when such appears to be the clear and obvious intention of the parties: 2 Devlin on Deeds, sec. 980; Fischer v. Laack, 76 Wis. 313, 45 N. W. 104; Gould v. Howe, 131 Ill. 490, 23 N. E. 602. [611] The deed to Pritchard is a warranty deed, conveying by metes and bounds the strip of land in question, referring to it as "being the same premises described as a right of way two rods wide, reserved by said parties of the first part in a deed this day executed by them to one John G. Lewis"; and it further excepts and reserves the timber situated upon said strip, with

the right of the grantor to go upon the land and remove said timber for the term of ten years.

It is contended on the part of the respondents that the language of the deed to Lewis, excepting and reserving the premises for a right of way, shows upon the face of the deed that the fee was not reserved, but only a right of way, and that, while the deed to Pritchard was an absolute conveyance of the premises by metes and bounds, still the reference to the Lewis deed made it a part of the Pritchard deed, and constituted notice to Pritchard that only a right of way was reserved; and, the fee having passed to Lewis, Pritchard only got by his deed the right of way reserved in deed to Lewis. This argument is based upon the theory that the fee passed to Lewis. Hence grantor Jones could only convey in his deed to Pritchard the remaining estate in him, which was only a right of way. The court below held, in a written opinion filed, that the reservation to Jones in deed to Lewis and subsequent grant to Pritchard was of an easement merely, and that the deeds were not so ambiguous as to require parol evidence to aid their interpretation; and the argument of counsel for respondents here is grounded upon the assumption that the deed to Lewis upon its face conveyed the fee and reserved the right of way only, and cannot be aided by extrinsic evidence, and several cases are cited upon this proposition, which will be considered.

Winston v. Johnson, 42 Minn. 398, 45 N. W. 958, is a case where it was held that the words "excepting and reserving" in a deed constituted a reservation and not an exception. But a careful examination of this case will show that it did [612] not turn altogether upon the words of the deed, but upon the intention of the parties as gathered from their acts, the surrounding circumstances, as well as the physical condition of the property and the practical interpretation of the reservation by the grantee. In Bolio v. Marvin, 130 Mich. 82, 89 N. W. 563, there was no express reservation, the language being, "saving and reserving, however, from the operation hereof, the road running along the southerly line of said parcels," etc.; and there the court recognizes the well-settled doctrine that the intention of the grantor is to be gathered from the whole instrument, and says (130 Mich. 83, 89 N. W. 563): "There was not the slightest occasion to include this land in the deed unless some interest was intended to be vested in the grantee."

The court also refers with approval to Reynolds v. Gaertner, 117 Mich. 532, 76 N. W. 3, where the words used were held to create an exception and not a reservation, and says (130 Mich. 84, 89 N. W. 563): "But the language employed in the deed construed in that case is very different from that which we are now construing. In that case the language was, 'except two and forty-six hundredths acres to the Chicago and Canada Southern Railroad.'"

In Wellman v. Churchill, 92 Me. 193, 42 Atl. 352, the language of the deed was, "with the reservation of a road two rods wide over the northerly side of said lot." There the language plainly indicated a reservation, and not an exception, and the court refers to the distinction between exception and reservation and says (92 Me. 195, 42 Atl. 353): "Exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the land and tenements devised, though exception and reservation have often been used promiscuously: Coke's Littleton, 47a. A construction given to a clause called a reservation is that it is an exception if it falls within that definition, and if such was the design of the parties."

[613] Elliot v. Small, 35 Minn. 396, 59 Am. Rep. 329, 29 N. W. 158, is where the clause was in form a reservation and not an exception, and was a reservation for a public street. In this case much stress is placed upon the apparent intention of the grantor, and it is said (35 Minn. 397, 29 N. W. 159): "The so-called reservation was not, strictly speaking, an exception of anything; for an exception is of a part of the thing granted, and of something in esse at the time of the grant."

So this case appears to turn upon the intention of the grantor and the wording of the reservation. In Towne v. Salentine, 92 Wis. 404, 66 N. W. 395, this court clearly recognizes the distinction between the words "exception" and "reservation," when used in a deed, and holds that, while a reservation for a right of way carries only an easement, an exception for the same purpose excludes the fee from the grant. In Patrick v. Young Men's Christian Assn., 120 Mich. 185, 79 N. W. 208, the language used in the deed was "excepting and reserving," and it was held to be an exception and not a reservation.

Many cases might be cited in support of the doctrine that excepting land from a deed for right of way purposes withholds the fee from the grant, and that the fee in such land excepted does not pass to the grantee unless it appears that the intention of the parties was that the right of way only should be reserved. The question therefore arises here whether the language of the deeds in question is so ambiguous or indefinite as to admit of extrinsic evidence. As before observed, the Lewis deed upon its face appears to except the fee and burden it with a right of way in favor of Pritchard, as well as the right in the grantee to keep it inclosed and maintain gates. No reason is perceived why the grantor, Jones, did not have the right to except the fee and so burden it. Nothing appears from the face of the deed to Lewis showing a contrary intention. Now, it appears very clearly from the deed to Pritchard, [614] which on its face purports to have been executed upon the same day as deed to Lewis, that the grantor had reserved the fee to this strip in deed to Lewis, because he reserves to himself the timber situated thereon, which clearly he could not have done if the deed to Lewis had conveyed the fee, although he also refers to the property as the premises reserved for right of way. Counsel for respondent says in his brief that the two deeds should be construed together, and in so doing it is not easy to see how it can be gathered from the deeds that the intention of the grantor was to convey the fee to Lewis. Besides, the interpretation put upon these deeds by practical construction indicates quite plainly that the fee in this strip was reserved in the deed to Lewis and passed to Pritchard. Immediately upon the execution of these deeds Jones swept the timber, which was valuable, from the strip, without any objection on the part of Lewis, which would be wholly inconsistent with the passing of the fee to Lewis; also the payment of taxes on this strip by Pritchard, and the fact that Mrs. Jones, one of the grantors, refused to sign deed to Lewis until Pritchard got his deed of the one acre, very strongly indicate that the fee to the strip was reserved, and intended to be reserved, in deed to Lewis, and transferred to Pritchard. In conveyances of this character the question of exception or reservation being largely one of intention, and the court always determining from the nature and effect of the provision itself, the subject matter, and the situation of the parties, we are

inclined to the opinion that sufficient ambiguity existed to warrant the admission of the competent testimony offered: Fischer v. Laack, 76 Wis. 313, 45 N. W. 104; Stone v. Clark, 1 Met. 378, 35 Am. Dec. 370; Miller v. Miller, 17 Or. 423, 21 Pac. 938. And considering the deeds in the light of the competent testimony produced, there is no room for doubt that Jones reserved, and intended to reserve, the fee in the conveyance to Lewis, and that he conveyed the same to Pritchard.

615 2. The next question for consideration is whether the sixth finding is supported by the evidence. It is in effect that the defendant Lewis entered into possession of the strip in question May 5, 1894, under deed from William Beatty, referee in the partition suit, and acquired title thereunder by adverse possession. Through the partition deed defendant Lewis got the interest of John G. Lewis. This was twenty-four acres, the one acre strip in question being owned in fee by plaintiff, subject to the right of Lewis to fence the same into his inclosure and maintain gates. The partition deed describes the tract by metes and bounds, and gives it as twenty-four acres, more or less, although it includes within the boundaries the twenty-four acres owned by Lewis and the one-acre strip owned by plaintiff. The plaintiff, being the owner in fee of the strip in question at the time of the execution of the partition deed, is entitled to the benefit of the presumption created by section 4210 of the Statutes of 1898. It is claimed on the part of the respondents that at the time of the execution of partition deed, May 5, 1894, defendant Lewis entered into possession under such deed and continued to hold adversely, but the evidence fails to establish such claim. The possession by Lewis after May 5, 1894, as shown by the evidence, was perfectly consistent with title to the fee in plaintiff and her ancestor. The evidence does not establish that the defendant Lewis, or his father, held the strip in question in hostility to the plaintiff. Evidence of adverse possession must be clear and positive, and should be strictly construed: Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171; Fuller v. Worth, 91 Wis. 406, 64 N. W. 995. Upon the facts proven the possession of the defendant Lewis was simply permissive, as well from the time of execution of partition deed as before. The actual occupation by defendant Lewis of the twenty-four acres, although the one-acre strip was inclosed therewith, was perfectly consistent with the

ownership of plaintiff, and not in hostility to her: Stewart
616 v. Harris, 9 Humph. 714; Nau v. Brunette, 79 Wis. 664, 48 N. W. 649; Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171; Woods v. Montevallo C. & T. Co., 84 Ala. 560, 5 Am. St. Rep. 393, 3 South. 475; Bailey v. Carleton, 12 N. H. 9, 37 Am. Dec. 190. We must therefore hold that the sixth finding is not supported by the evidence.

Upon the question of the mortgage to defendant Adams creating a cloud upon the plaintiff's title little need be said. The mortgage claimed to be a cloud upon the plaintiff's title in this case was executed by defendant Lewis and his wife to defendant Adams in December, 1903, and included therein the strip of land owned by the plaintiff, without any reservation whatever. The mortgage was executed upon the theory that defendant Lewis owned the fee. Since he did not, the mortgage is a cloud upon the plaintiff's title and she is entitled to relief. It therefore follows that the judgment of the court below must be reversed.

By the COURT. The judgment of the court below is reversed, and the cause remanded with instructions to enter judgment for the plaintiff.

A Reservation in a Deed is some new thing issuing out of what is granted, and while not affecting the title to what is granted, may reserve to the grantor the use or enjoyment of a part thereof: Eiseley v. Spooner, 23 Neb. 470, 8 Am. St. Rep. 128. The two words, however, are often used interchangeably: See Elsea v. Adkins, 164 Ind. 580, 108 Am. St. Rep. 320. In a deed in fee a reservation of "a road ten feet wide along the line of C D, to be shut at each end by a bar or gate," carries only a right of way, and not the fee of the strip of land: Kister v. Reeser, 98 Pa. St. 1, 42 Am. Rep. 608. But a grant by deed of land, "saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as has been lawfully taken for a public road," reserves to the grantor the fee to the soil of the road, and not merely an easement: Munn v. Worrall, 53 N. Y. 44, 13 Am. Rep. 470.

THEIS v. DUN.

[125 Wis. 651, 104 N. W. 985.]

CORPORATIONS.—Liability to Pay Stock Subscriptions in a corporation can only be rightfully satisfied as to a stockholder not consenting by payment according to the subscription contract. (p. 881.)

CORPORATIONS.—Reduction of Authorized and Subscribed for Capital Stock in a corporation can only be accomplished by voluntary surrender by subscribers pro rata, or by some method which will not prefer one stockholder over another. (p. 882.)

CORPORATIONS.—Corporate Power to Reduce Stock authorized and subscribed for does not authorize an arbitrary cancellation of stock, or cancellation of a subscription liability for stock, without in some proper manner treating all stockholders with like favor. (p. 882.)

CORPORATIONS—Equity Jurisdiction to Revise Corporate Action.—A court of equity has no jurisdiction to supervise or revise corporate action where there is no bad faith in the matter, but only error of judgment. In such matters the members of a corporation, as to authority lodged with them, and the board of directors in the field, where that is the governing body, are supreme within the limits of honest administration, and of the boundaries of discretion. (p. 883.)

CORPORATIONS—Equity Jurisdiction to Revise Corporate Action.—If the act of a corporation, or its governing body, though lawful in itself, is designed to accomplish some illegitimate object, and the result, if permitted to operate, will be injurious to the corporation or its members not concerned in the transaction, they may successfully invoke equity jurisdiction for the protection of the corporation where the proper officers will not act. (p. 883.)

CORPORATIONS—Fraudulent Reduction of Capital Stock—Equity Jurisdiction.—If authority to reduce authorized capital stock in a corporation is in form exercised by it for the wrongful purpose of creating a basis for favoring the majority of the stockholders at the expense of the minority, a court of equity will interfere on behalf of the latter and declare the transaction void. (p. 884.)

CORPORATION—Abuse of Power.—If stockholders in a corporation, by combining a ruling majority, exercise a corporate power with bad motive, to the pecuniary loss or prejudice of the corporation and outside stockholders, the wrongful use of power together with the consequences thereof are open to judicial investigation and redress. (p. 884.)

CORPORATIONS—Abuse of Power—Equity Jurisdiction.—Abuse of power to the direct or indirect injury of stockholders in a corporation, as well as usurpation of power with like effect, is a subject that may be dealt with by courts and by the remedies which equity affords when there is no other remedy which is reasonably effective. (p. 884.)

CORPORATIONS.—Authority to reduce capital stock is limited by its purposes, and when it is exercised clearly for an illegitimate purpose, especially when such purpose is fraudulent, the act is void. (p. 884.)

Timlin & Glicksman and W. L. Gold, for the appellants.

M. T. Halphide, for the respondents.

[657] MARSHALL, J. According to the facts found as indicated, and they are not only well supported by the evidence but in the main are admitted by the answer, the dominating spirits among appellants conceived that by the preliminary contract mentioned in the statement they got the worst of the bargain in agreeing to contribute twenty thousand dollars in money against, as an equivalent, the patent right, to make up a capital of forty thousand dollars, in a corporation organized to acquire and use in all legitimate ways such patent right, and sought by means of the statutory authority to reduce capital stock in such an organization to even up with the respondents, to accomplish that under the guise of statutory authority, by arbitrarily extinguishing their liability for twelve thousand dollars upon their capital stock subscriptions, and canceling a corresponding amount of full-paid stock as if the same had no consideration to support it. By that it was supposed the twenty thousand dollars agreed in the preliminary contract, and in effect in the corporate organization, to be contributed as an equivalent for the patent right, would be reduced to eight thousand dollars, regardless of the wishes of respondents.

While appellants' claim, as regards advantage having been taken of them in the preliminary contract and partial execution thereof, is referred to upon appeal as explaining, and perhaps palliating, the proceedings to enable them to obtain without the aid of any court, and without the consent of the other stockholders, a satisfactory measure of redress for their supposed misfortune, counsel do not venture to suggest that such claim, if it were in all respects well founded, warranted using, as they did, the statutory authority relating to the reduction of capital stock against the protest of respondents.

It must be conceded that liability to pay a subscription indebtedness [658] for stock in a corporation can only be rightfully satisfied as to a stockholder not consenting, by payment according to the subscription contract. No reduction of authorized and subscribed for capital stock can be accomplished except by voluntary surrender by subscribers pro rata, or some method which will not prefer one stockholder over another. Corporate power in that regard does not authorize an arbitrary preferential cancellation of stock, or cancellation of a subscription liability for stock without in some proper manner treating all stockholders with like favor. The idea with

which appellants started out, that they could effectively use their superior voting power to obtain an advantage over the holders of full-paid stock, has no support in reason or in law, and, as we understand it, no one connected with the case ventures to claim to the contrary. If the majority of stockholders of a corporation could so treat its assets and be immune from judicial interference in respect thereto, there would be no protection for the minority but the conscience of the majority, which would be a very uncertain reliance. The law in respect to the matter is well stated in Purdy's Beach on Private Corporations, section 195a, thus: "A statute which authorizes a corporation, at any meeting called for the purpose, to reduce its capital stock and the number of shares therein, does not empower it to effect a reduction by purchasing shares of a particular subscriber. Unless such course is adopted as will work exact and even justice to all owners of stock, the statute is inoperative. When the purpose is to reduce the capital stock by purchase of shares, they may not be purchased from any particular stockholder alone without consent of all, but each stockholder is entitled to share pro rata, with all the others, in his surrender of shares for such purchase. No stockholder can be forced to sell his shares for reduction of the capital stock. Therefore, when the transaction would operate for the relief and benefit of those from whom the stock is purchased and would increase the liability of the remaining stockholders, it is invalid."

639 It is argued on behalf of appellants that, conceding they could not rightfully force an adjustment of their differences with respondents in the manner attempted, the statute gave them the right to reduce the authorized capital stock, which was the only thing really accomplished by the proceedings annulled by the judgment; that the real wrong from respondents' standpoint was, or will be, effected, if at all, by executing the purpose of the resolution; that so far as appellants had a right to do what was done their motives in the matter cannot be judicially inquired into and their acts condemned upon the ground that such motives were bad. Counsel invoke the rule that the motives of members of a legislative body in doing what they may rightfully do are not a subject for judicial inquiry. That, at least, has its limitations as regards private corporations, if it has any application thereto at all: Dillon on Municipal Corporations, 4th ed., sec. 311.

We do not intend by the foregoing to suggest that a court of equity can supervise or revise corporate action within the scope of the corporate power where there is no bad faith in the matter—only error of judgment. In such matters the members of a corporation, as to authority lodged with them, and the board of directors in the field where that is the governing body, are supreme within the limits of honest administration and of the boundaries of discretion. But where the act of either such body, though lawful in itself, is designed to accomplish some illegitimate object—and the mainspring of the transaction is some ulterior motive—and the result, if permitted to operate, will be injurious to the corporation or members not concerned in the transaction, such a member may succe sfully invoke equity jurisdiction for protection of the corporation where the proper officers will not do it. That cannot be too strongly impre sed upon the minds of those in control of corporate affairs: Wildes v. Rural H. Co., 53 N. J. Eq. 452, 32 Atl. 676; Berger v. United States Steel 660 Corp., 63 N. J. Eq. 506, 53 Atl. 14; Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842.

In the last case cited it was distinctly held that the purpose of the governing body of a corporation in determining upon a particular line of action may of itself render such action invalid and subject to annulment at the suit of stockholders. This language was used in the opinion: "It is well settled that an act may be intra vires or ultra vires, according to the purpose which the directors have in view in doing it. The expenditure of money of a corporation by its directors is per se often a neutral act; whether such expenditure is intra vires or ultra vires must, in large numbers of instances, depend upon the purpose—the actual honest purpose—which the directors have in view."

There was no need in this case to go very far to discover that the purpose of appellants in passing the resolution complained of was entirely illegitimate. Such purpose clearly appeared by the records of the corporation. They showed that, while the formal resolution voted on and certified to be filed as required by law did not disclose its real object, an amendment thereto covering the matter was in due form adopted and was in reality made a part thereof. The resolution so amended was acted upon the first time the matter was up for consideration and lost for want of the requisite two-thirds vote in favor thereof. The same resolution as

amended was reconsidered and passed on the second occasion of the matter being taken up. If there was any question as to the scope of the amended resolution, it would be solved by the subsequent resolution instructing the board of directors how to carry out the reduction of stock.

So it comes down to this: The authority to reduce authorized capital stock was in form exercised for the wrongful purpose of creating a basis for favoring the majority of stockholders at the expense of the minority. In short, a statutory 661 authority given for one purpose was abused by being used for another and clearly illegitimate purpose. The doctrine advanced, that if stockholders, by combining a ruling majority, exercise a corporate power with bad motive to the pecuniary loss or prejudice of the corporation and outside stockholders, only the mere consequences in that regard, not the wrongful use of power, is open to judicial investigation and redress, has no foundation here. Abuse of power to the direct or indirect injury of stockholders in a corporation, as well as usurpation of power with like effect, as we have seen, is a subject that may be dealt with by courts and by the remedies which equity affords when there is no other remedy, or no other remedy which is reasonably effective. It would be difficult to conceive of a plainer, more wrongful, obviously fraudulent abuse of corporate power than the one under consideration. The authority to reduce capital stock is limited by its purposes. When it is exercised clearly for an illegitimate purpose, especially when such purpose is fraudulent, as in this case, the act is void. In Niagara S. Co. v. Tobey, 71 Ill. App. 250, it was held that a statute like ours contemplates a reduction of capital stock only on a basis which deals with all stockholders alike, and that any other attempted reduction is void as to a nonsuiting stockholder: Currier v. Lebanon S. Co., 56 N. H. 262, is to the same effect.

We view the resolution, in form reducing the capital stock as the statute authorizes, the same as if the amendment referred to, and the real purpose as plainly indicated by the corporate proceedings had both before and after such passage, were embodied therein by express words. It is quite clear that in the absence of such purpose such passage would not have occurred. The elements in the transaction are inseparable. Each was a part of a single scheme conceived by appellants to benefit themselves at the expense of the corporation and of the respondents. If they had any claim against

662 the first parties to the preliminary contract, the way attempted was not the proper one to enforce it. They directly and indirectly wronged respondents and wronged the corporation beyond the power of redress, efficiently, at the suit of respondents by any other remedy than that which a court of equity affords. Appellants, through a board of directors composed mostly of their own number, were in the control of the corporation. They insisted upon carrying out their scheme of so converting its assets to their own use as to put themselves on the ground floor, so to speak, as they viewed the matter, with holders of full-paid stock. Presumably, before this action was commenced they in form took to themselves the corporate assets represented by their subscription liabilities. The directors refused to recognize the holders of full-paid stock to any greater extent than forty per cent of their holdings. They insisted that they were justified in so doing by the resolution reducing authorized capital stock. There was no reason whatever to expect that the wrongs committed would be remedied by those in control of the corporate affairs. All of respondents were united in interests and similarly affected. The situation was one which in its entire scope could only be dealt with in an equitable action. There may not be any precedent for just such an action as this, and none is necessary to sustain it. Since it is clearly within the principles of equity jurisprudence, that is sufficient.

As to the form of the relief, it may be that some other would have been more orderly, but, as at present advised, it would seem that—since the proceedings were mere steps in the execution of a wrongful purpose to change the relations of one class of stockholders of the corporation to their advantage, and those of another to their disadvantage, and so not to any extent within the statute relating to the reduction of authorized corporate stock—there could not be a more direct way to remedy the mischief than by judicially declaring the whole of such proceedings void and directing their cancellation 663 of record. In any event, the remedy which the court awarded was efficient. Appellants were not prejudiced by any mere matter of form.

By the COURT. The judgment is affirmed on both appeals.

An Increase or Reduction of the Capital Stock of a corporation is a fundamental change in its affairs, and must be authorized by a majority of the stockholders, at a corporate meeting, and in the manner prescribed by law: McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am.

St. Rep. 203. If a corporation increases its capital stock, an existing stockholder is entitled to subscribe for his pro rata share of the increased stock at par, and the majority of the stockholders cannot put a premium on the new stock in the absence of express authority: Hammond v. Edison Illuminating Co., 131 Mich. 79, 100 Am. St. Rep. 582. As to the rights of the directors or stockholders of a corporation, as against its creditors, to diminish its prescribed capital, see Shields v. Hobart, 172 Mo. 491, 95 Am. St. Rep. 529; Heller v. National Marine Bank, 89 Md. 602, 73 Am. St. Rep. 212; note to Buck v. Ross, 57 Am. St. Rep. 66.

WISCONSIN TELEPHONE COMPANY v. MILWAUKEE.

[126 Wis. 1, 104 N. W. 1009.]

MUNICIPAL CORPORATIONS—Telephone Corporation, Power to Impose Restrictions Upon.—Where the legislature, by statute, has conferred on telephone corporations authority, subject only to the provision that they shall not obstruct or incommode the public use of any road, highway, bridge, stream or body of water, a municipal corporation has no power to impose any condition on a telephone corporation, except such as it may lawfully impose under its power to control and regulate the streets, alleys and public grounds, and prevent the encumbering thereof, and its general police power. (p. 888.)

MUNICIPAL CORPORATIONS—License Fees and Telephone Corporations.—Where the legislature confers authority on a telephone corporation, subject only to the provision that it shall not obstruct or incommode the public use of any road, highway, bridge, stream or body of water, a municipal corporation has no power to exact a license fee from such a corporation for the privilege of constructing, maintaining and operating its telephone lines on the streets of the city. (p. 888.)

CONSTITUTIONAL LAW—License on Occupations, Power to Impose.—The Power Rests in the State, and not in Any Municipal Corporation, to determine what occupations shall be licensed. (pp. 890, 891.)

A MUNICIPAL CORPORATION cannot Exact a License Fee as a Means of Raising Revenue where the power to license has not been delegated to it. (p. 891.)

LICENSE FEE, When Must be Deemed Imposed for Revenue, and not for Supervision or Inspection.—An ordinance requiring telephone and telegraph corporations to apply annually for a license to maintain, for the ensuing year, the poles and cross-arms then erected and to pay, for the use of the city, one dollar for each pole authorized to be maintained thereunder, and providing that the revenue derived from the license shall become a part of the general city fund, must be regarded as imposing a license fee for revenue and not for inspection and supervision. (p. 892.)

MUNICIPAL CORPORATIONS, License, Power of the Courts to Determine Purposes of.—Where the power to license exists, a reasonable discretion is vested in the municipality, but the courts have a right to look into ordinances with a view of determining whether

they are passed for the purposes of revenue, although sought to be upheld as police regulations. (p. 893.)

LICENSE FEES, Power to Impose for Inspection and Supervision, Duty of Courts to Limit Amount of.—Though a city has the right to impose reasonable charges for inspection and supervision, it should not be permitted, under the guise of that power, to collect large amounts of revenue for the benefit of the city, regardless of the amount necessary for such inspection and supervision, and where the court can see that revenue, and not regulation, is the aim, and not the incident, and no power is given to license the occupation, the ordinance is void. (p. 893.)

Suit to enjoin the enforcement of an ordinance of the defendant municipality imposing a license fee. The complainant relied on the Statute of 1898, construed in Wisconsin Telegraph Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828, as giving the plaintiff the right to construct and maintain its telephone lines without applying for or obtaining any franchise from the city. Complainant further alleged that it was not maintaining its lines under any grant of permission from the city, and that its poles and lines were so constructed as not to interfere with public travel or affect the public safety, and that defendant had adopted, in 1904, an ordinance making it the duty of all telephone corporations to apply annually for a license to maintain the poles and cross-arms already erected, and to pay for such license one dollar for each pole, etc., and providing that the revenue derived from such license should be credited to, and become a part of, the general city fund, and that any person or corporation violating the provisions of the ordinance should be subjected to a penalty of one hundred dollars for each offense.

The answer admitted the allegations of the complaint, except that the defendant denied that the poles of the plaintiff were so located and maintained as not to affect the public safety, and that the license was imposed without authority of law, or the ordinance invalid. The plaintiff demurred to the answer for want of facts sufficient to constitute a defense.

Miller, Noyes & Miller, for the appellant.

Carl Runge, city attorney, and George E. Ballhorn, assistant city attorney, for the respondent.

[7] KERWIN, J. The questions presented here upon the facts admitted by the demurrer are thus stated by respond-

"First. Has the city authority to exact a license such as is provided for in the ordinance, the enforcement of which the appellant seeks to enjoin?

"Second. Does the ordinance in question contravene the fourteenth amendment of the federal constitution and similar provisions of the Wisconsin state constitution?"

The first proposition stated by counsel practically embraces the controversy before us, and we shall proceed to consider the right of the defendant city to exact the license fee. It is apparent from the argument of counsel for respondent, as well as from the authorities cited, that the ordinance is sought to be upheld under power of the defendant city to license the plaintiff and exact the license fee provided for in the ordinance. It is, however, contended that the license fee is not [8] exacted for any right or privilege conferred upon the plaintiff, but simply as a police regulation, and reference is made to the provisions of the city charter conferring power to prevent the encumbering of streets, lanes and alleys, and giving the city the right to control and regulate the streets, alleys and public grounds of said city, and under these provisions, as well as under the general police power, it is contended that the ordinance is in the nature of a police regulation. No power is conferred upon the defendant under its charter or by any law of this state to grant to the plaintiff the privilege of constructing, maintaining or operating its telephone lines upon the streets of defendant city. This authority is specifically conferred by the legislature of this state, subject only to the provision that it shall not "obstruct or incommode the public use of any road, highway, bridge, stream or body of water." No authority is conferred upon the defendant to impose any other condition upon the plaintiff except such as it may lawfully impose under its power to control and regulate the streets, alleys and public grounds and prevent the encumbering thereof, and its general police powers. Beyond this it has neither the right to confer any privilege upon the plaintiff in the use and occupation of streets, nor to impose conditions: State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565. It is very clear that the defendant had no power to exact a license fee from the plaintiff for the privilege of constructing, maintaining or operating its telephone lines upon the streets of defendant city: Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828. And it is con-

ceded on the part of the respondent that the ordinance can only be sustained on the theory of a police regulation. It will be seen, however, that the cases cited by respondent are cases where the license fee was upheld upon the ground that the municipality had the right to grant some privilege to the company licensed, and for the granting of which a license fee [9] was sustained, or where the purpose of the ordinance was to regulate and not to license. Counsel for respondent frankly concedes that the city has no franchise to grant to the plaintiff and no power to confer under which the poles and wires may be maintained in streets, but contends that under the broad power of regulation conferred by the legislature and the police power it has the right to make and enforce reasonable regulations for the protection and safety of its citizens, and quotes at length from Western Union Tel. Co. v. Philadelphia (Pa.), 21 Am. & Eng. Corp. Cas. 40, 12 Atl. 144; but the case is not in point upon the proposition asserted, for the reason that the city of Philadelphia had the power to grant to the company the right to occupy the streets and impose upon the company such conditions and regulations as the municipal authorities might deem necessary, and the court said: "That such is the relation of the city to the various companies which had been empowered to occupy its streets with a view to gain is to me abundantly clear, and they should not grudge a reasonable compensation for the space they occupy and the risks which she incurs on their account."

Counsel quotes from Chicago etc. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118, to the effect that the charter of a corporation does not exempt it from police supervision and regulation, which is true as applied in that case; but the question here is not one of escape from police regulation, but whether the ordinance of the defendant is within it. People v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820, clearly involves a regulation under a statute of New York concerning such companies, and which provided for the removal of such wires and cables from the surface of the streets and laying the same underground, and the court said (107 N. Y. 602, 1 Am. St. Rep. 893, 14 N. E. 823): "The claim that this law is void because it imposes a tax on the companies referred to cannot be maintained. The act of 1884 imposes the duty upon such companies to remove and [10] cause to be laid underground all such wires and cables as are re-

quired in their business, and there is no reason why such companies should not be subjected to the payment of all expenses incurred in the construction of works required to carry on their own business."

In State v. Janesville St. R. Co., 87 Wis. 72, 41 Am. St. Rep. 23, 57 N. W. 970, 22 L. R. A. 759, the question involved under the ordinance was one of reasonable regulation. The ordinance provided for the location and use of electric wires in the streets, reasonable safeguards for the same, and a penalty for the violation of the regulation. No license fee whatever was exacted. It was purely a regulation requiring safeguards and providing a penalty for failure to furnish the same. Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565, involved the question of the city's right to control its streets and prohibit the encumbering of the same, and it was held that under this power the city had the right to prevent the encumbering by telephone poles certain of its streets, in the exercise of a reasonable discretion, and that the common council had a reasonable discretion in the location of such poles. The dominant purpose of the street being for public passage, any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use. The decision only goes to the extent of authorizing a reasonable regulation on the part of the city. In Baltimore v. Baltimore T. & G. Co., 166 U. S. 673, 17 Sup. Ct. Rep. 696, 41 L. ed. 1160, it was held that the street railway company, occupying the streets by permission of the municipality, was subject to reasonable regulations by subsequent ordinances, and that the city did not exhaust its power of regulation by one exercise of it. In Philadelphia v. Western Union Tel. Co., 11 Phila. 327, the telegraph company commenced the construction of a new line on the streets, and the city sought to regulate such construction. Its right of regulation was sustained on the ground that the telegraph company was occupying the streets by permission of the city under the restriction [11] that it should not use the streets of Philadelphia without the consent of the mayor and city council first had and obtained. The cases generally cited by counsel for respondent from Pennsylvania and from the supreme court of the United States upon appeal from that state turn upon the laws of that state, which authorize municipalities to grant permission to such companies to occupy the streets and impose

such conditions and regulations as the municipal authorities may deem necessary. No such power is conferred upon municipal corporations in Wisconsin: State v. Sheboygan, 111 Wis. 23, 86 N. W. 657. Ash v. People, 11 Mich. 347, 83 Am. Dec. 740, upholds the right of the city of Detroit to pass an ordinance prohibiting the keeping of stalls for the sale of fresh meats outside of the public markets without license and payment of license fee under its charter, which expressly empowered the common council to license and regulate butchers and the keepers of shops and stalls. Marmet v. State, 45 Ohio St. 63, 12 N. E. 463, is a case where right to license is upheld under express legislative authority given. Also in State v. Herod, 29 Iowa, 123, power was conferred upon the city to license. In St. Louis the title to the streets being in the city, and the charter giving the right to license, tax and regulate telegraph companies, it was held that, the city having the right to grant the use of the streets to telegraph companies, it regulates the use when it prescribes the terms and conditions upon which they shall be used. The case turns upon the power of the city to grant the right to use the streets to the telegraph company: St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 Sup. Ct. Rep. 990, 37 L. ed. 810.

But we will not further extend discussion of cases cited by respondent. It is manifest they do not support the proposition that the defendant has authority to exact a license such as is provided for in the ordinance in question. The power rests in the state to determine what occupations shall be licensed: Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. [12] 828; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Cooley's Constitutional Limitations, 7th ed., 884. And it is not claimed that any power had been granted to the defendant by the legislature to license the plaintiff, nor is it claimed that the plaintiff has failed to comply with all regulations respecting its use of the streets, or that it has violated the law granting it the right to occupy the streets by obstructing or in any manner interfering with the public use of the streets of defendant. And, no power having been delegated to defendant to license plaintiff, it could not exact a license fee as a means of raising revenue: Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565; State v. Sheboygan, 114 Wis. 505, 91 Am. St. Rep. 934, 90 N. W. 441, 58 L. R. A. 748;

Michigan Tel. Co. v. Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104. But it is claimed that the ordinance is a regulation and not a revenue measure, and that it may be sustained upon the theory that the defendant has the right to impose such fee for supervision and inspection under the police power. Whether the city has power to impose any fee upon the plaintiff for inspection and supervision is not necessary to decide, and we do not decide, in this case, because it is clear that the ordinance was passed for no such purpose, but, on the contrary, was an attempt to charge plaintiff for the privilege of maintaining its poles and wires in the streets. If the city had power to grant any privileges in the streets to the plaintiff, or had express authority from the legislature to license the plaintiff so as to bring its case within the authorities cited, the respondent's position would be quite different. But, as before observed, the defendant had no right or privilege to grant to the plaintiff, and no power to prevent its use of the streets in a reasonable manner consistent with the public use, and the provisions of the ordinance set out in the statement of facts show that it was a revenue measure and not a regulation.

[13] The ordinance requires telephone and telegraph companies to apply annually for a license to maintain, for the ensuing year, the poles and cross-arms then erected, and provides for payment, for the use of the city, of one dollar for each and every pole authorized to be maintained thereby. The ordinance further provides that all revenue derived from such license shall become part of the general city fund, and imposes a penalty for any violation, and further provides that the erection or maintenance of any single pole or cross-arm in violation of the provisions thereof shall constitute a distinct and separate offense thereunder. The plain import of this ordinance is that it grants the privilege to telephone and telegraph companies to occupy the streets of defendant city with their poles and cross-arms in consideration of the license fee exacted: Neuman v. State, 76 Wis. 112, 45 N. W. 30; Chilvers v. People, 11 Mich. 43; Home Ins. Co. v. Augusta, 50 Ga. 530. There is nothing in the ordinance indicating that the fee is exacted for inspection or supervision, or that it will be used for such purpose, or that any such amount is necessary to defray the expense of such inspection and supervision, and it is quite obvious that the aggregate amount sought to be collected would be far beyond the reasonable ex-

pense of such inspection and supervision. We think it safe to say that any reasonable cost of inspection and supervision would not exceed one-tenth of the revenue chargeable according to the terms of the ordinance. True, where the power to license exists, a reasonable discretion is vested in the municipality, but courts have a right to look into ordinances with a view of determining whether they are passed for the purpose of revenue, although sought to be upheld as police regulations. Even if the city had the right to impose reasonable charges for inspection and supervision, it should not be permitted under the guise of such power to collect large amounts of revenue for the benefit of the city regardless of the amount necessary for such inspection and supervision. And where the court can [14] clearly see that revenue, and not regulation, is the aim, and not the incident, and no power is given to license the occupation, the ordinance is void: Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Postal Tel. etc. Co. v. Taylor, 192 U. S. 64, 24 Sup. Ct. Rep. 208, 48 L. ed. 342; Michigan Tel. Co. v. Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; Mayor etc. v. Second Ave. R. Co., 32 N. Y. 261; Memphis v. Am. Exp. Co., 102 Tenn. 336, 52 S. W. 172.

It follows from what has been said that the order must be reversed.

By the COURT. The order of the court below is reversed, and the cause remanded with instructions to sustain the demurrer.

If a License Fee Exacted by a Municipality **is not apparently unreasonable, the courts will not interfere with the discretion of the city council in fixing it. But the power to regulate and license, granted to a municipality by the state, is deemed to be conferred solely for police purposes and cannot be used as a means of increasing the municipal revenue. However, a city, notwithstanding it has enacted an ordinance authorizing an electric company to erect and maintain poles and to string wires thereon in the public streets, and has provided rules and regulations for the government of those maintaining such poles and wires, may by subsequent ordinance require the owners of every electric light or street railway having poles standing upon a street to pay an annual license of twenty-five cents per pole, and such ordinance will be construed as imposing a license for paying the expenses of enforcing rules and regulations already in force: Fort Smith v. Hunt, 72 Ark. 556, 105 Am. St. Rep. 51.**

GROSS COAL COMPANY v. ROSE.

[126 Wis. 24, 105 N. W. 225.]

A CORPORATION may Maintain an Action for Slander and Libel upon it in the way of its business or trade. (p. 895.)

CORPORATION—Words Libelous per Se.—To charge of a corporation, whether orally or in writing, that at a time when there was a coal famine and people were suffering for fuel, it, though engaged in the business of selling coal, not only charged an exorbitant price for its coal, but actually refused to sell, even at that price, to people suffering from sickness, is libelous and slanderous per se. (p. 895.)

SLANDER, Special Damages, When Need not be Alleged.—Words spoken of a person in direct reference to his business or trade, which charge him with incapacity, fraud, trickery, dishonorable and mean conduct in the transaction of his business, thereby necessarily tending to injure him in such business, are actionable without proof of special damage. (p. 896.)

Action for slander and libel. The complaint contained two counts, one for slander and the other for libel. The slanderous charge consisted of remarks made by defendant at a public meeting as follows:

"What were the conditions then [meaning the coal famine of 1902-1903]? One or two coal dealers [meaning the plaintiff] in the city of Milwaukee had hard coal, for which they [meaning the plaintiff] asked $15 a ton. And I am going to mention some names here, because I told those men [meaning the plaintiff] that I would do it, and I am going to show them [meaning the plaintiff] that I keep my word. The Gross Bros. Coal Company [meaning the plaintiff] had coal. People came to me with the money in their hands and tears in their eyes, with suffering at their homes and sickness, and said, 'Mr. Mayor, can't you get us some coal?' I went to these people [meaning the plaintiff] and asked them [meaning the plaintiff] if they would fill the orders for coal at $15 a ton, and when I accompanied the orders with physicians' certificates they [meaning the plaintiff] said that they would; but when I sent the orders they [meaning the plaintiff] would not do it. I called the coal dealers together. I called their attention to the fact that my office was besieged from early morning until late at night by people who were suffering. They assured me that it would be impossible to secure coal until the opening of navigation."

The complaint also averred that the plaintiff gave the defendant an opportunity to retract the slander, but that in-

stead of doing so, he sent the following letter to plaintiff's attorney, which was also published in the newspapers:

"Milwaukee, March 26, 1904.

"Messrs. Lenicheck, Fairchild & Boesel,

"198 West Water Street, City:—

"GENTLEMEN: In answer to your letter of the 24th, requesting me to retract the statements made by me at the Davidson Theatre meeting last Wednesday evening, concerning the conduct of Gross Bros. during the coal famine of last year, I have to say: I made no statement at the Davidson Theatre meeting that I desire to retract. I am not in the habit of making statements that I cannot prove. I stated that the Gross Bros. charged $15 per ton for hard coal. The statement was true. I stated that they agreed to honor my orders for coal if physicians' certificates were attached; that orders with physicians' certificates attached were sent to them, and the parties who presented them had the money with which to pay $15 per ton for the coal, but that the orders were refused. That statement was likewise true. I did not state all that transpired, but I will disclose all before the campaign closes. If you wish to begin proceedings in court, fire away.

"Respectfully yours,

"DAVID S. ROSE."

A demurrer to the complaint was overruled and the defendant appealed.

Ryan, Ogden & Bottum, for the appellant.

Lenicheck, Fairchild & Boesel, for the respondent.

[26] WINSLOW, J. A corporation may sue for a slander or libel upon it in the way of its business or trade: Newell on Libel and Slander, 2d ed., 360. There can be no doubt that the published letter which forms the basis of the second cause of action was libelous per se under the circumstances set forth in the complaint. It charged, in substance, that at a time when there was a coal famine and people were suffering for fuel the plaintiff, though engaged in the business of selling coal, not only charged extortionate prices for its coal, but actually refused [27] to sell coal, even at those prices, to people suffering from sickness. Such a charge is libelous, because imputing mean and abhorrent conduct to the plaintiff in the management of its business, and thus tending necessarily to injure it in such business: Newell on Libel and

Slander, 2d ed., 43, secs. 1, 14; Brown v. Vannaman, 85 Wis. 451, 39 Am. St. Rep. 860, 55 N. W. 183.

It is claimed, however, that while the words may be libelous when written and published, the same words do not constitute slander per se when spoken, and that there is no sufficient allegation of special damage; hence that the first cause of action is subject to demurrer. This contention, also, must fail. Words spoken of a person in direct reference to his business or trade, which charge him with incapacity, fraud, trickery, dishonorable and mean conduct in the transaction of his business, thereby necessarily tending to injure him in such business, are actionable without proof of special damage: Newell on Libel and Slander, 2d ed., 168, secs. 1, 2; 19 Am. & Eng. Ency. of Law, 2d ed., 942. There seems to be no need of further discussion of the subject.

By the COURT. Order affirmed.

Words Falsely Published of a person in connection with his business, trade, or profession are actionable per se without proof of special damages: St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; Brown v. Vannaman, 85 Wis. 451, 39 Am. St. Rep. 860; Mitchell v. Bradstreet Co., 116 Mo. 226, 38 Am. St. Rep. 592; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479.

A Corporation may Sue for a Libel or slander against it in the way of its business and trade: St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; Trenton etc. Ins. Co. v. Perrin, 3 Zab. 402, 57 Am. Dec. 400; Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87, 95 Am. Dec. 519.

CHASE v. HINCKLEY.

[126 Wis. 75, 105 N. W. 230.]

FRAUDS, STATUTE OF—Agreement, When Within Because not to be Performed Within a Year.—Any Excess of a Year, however short, brings the contract within the statute of frauds and renders it nonenforceable. (p. 898.)

FRAUDS, STATUTE OF.—Agreement not to be Completed Until a Year After the Commencement of Performance, is within the statute of frauds, though such commencement is to be on the day following the making of the agreement. (p. 898.)

STATUTE OF FRAUDS.—A Contract for Personal Services is Within the statute of frauds if it is by its terms for a year and is to commence at a date in the future, though, as a matter of law,

the contract might be terminated within a year by the death of one of the contracting parties. (p. 899.)

FRAUDS, STATUTE OF.—Partial Performance of a Contract for Personal Services void under the statute of frauds does not save it. (p. 899.)

APPEAL AND ERROR.—The Finding of the Trial Court on a Question of Fact will not be disturbed on appeal, unless the evidence as preserved in the record so clearly preponderates against the decision as to indicate that for some reason material evidence was overlooked or not properly considered which might reasonably change the result. (p. 900.)

Action to recover for work and labor. The defense was that the defendant employed the plaintiff on November 1, 1903, to work for a year at a salary of four hundred and fifty dollars; that the plaintiff commenced work accordingly, but on September 2, 1904, abandoned defendant's service and refused to further comply with the contract; also that in a prior action by the plaintiff against the defendant to recover for the same demand, judgment had been entered in favor of the defendant.

The evidence tended to show that the contract between the parties was entered into in the latter part of October, 1903, and that under it plaintiff was to commence work on the following Monday, and did so, and that in the former action between the parties the plaintiff, before the trial, withdrew that part of his claim here involved.

Judgment for the plaintiff and defendant appealed.

Edgar L. Wood, for the appellant.

William Kaumheimer, for the respondent.

77 MARSHALL, J. The decision that the work performed by respondent was not done under any valid contract for a continuous year's service commencing on the first day of November, 1903, in effect, found against appellant on the controversy as to whether the agreement was "by its terms not to be performed within one year from the making thereof." That has sufficient support in the evidence. Respondent testified quite positively that the agreement was made October 29, 1903, for services to be rendered for the period of one year commencing on the first day of November following. The testimony of appellant in respect to the matter, by itself, left the date of the agreement in considerable doubt. In that situation the trial court concluded, as well it might

have, that the contract was by its terms not to be performed till the expiration of one year and two days from its date. The excess of two days was just as efficient as a longer period to render the agreement void under subdivision 1, section 2307, of the Statutes of 1898, which provides that "every agreement" shall be void "that by its terms is not to be performed within one year from the making thereof." Any excess of the year period, however short, is sufficient to satisfy the statute. That was stated very forcibly by Lord Ellenborough in Bracegirdle v. Heald, 1 Barn. & Ald. 722, the reason therefor being expressed in these words: "If we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for in point of reason, an excess of twenty years will equally not be within the act. Such difficulties rather turn upon the policy than upon the construction of the statute."

The fact that the period of service agreed upon was to extend for one year from the time performance commenced does not take the case out of the statute, for where performance is to commence in the future, for the purposes of the statute, [78] the period to be considered is that beginning with the date of the agreement: Sharp v. Rhiel, 55 Mo. 97; Cohen v. Stein, 61 Wis. 508, 21 N. W. 514; Draheim v. Evison, 112 Wis. 27, 87 N. W. 795; Sutcliffe v. Atlantic Mills, 13 R. I. 480, 43 Am. Rep. 39; Kleeman v. Collins, 9 Bush (Ky.), 460; Little v. Wilson, 4 E. D. Smith (N. Y.), 422; Banks v. Crossland, L. R. 10 Q. B. 97; Scoggin v. Blackwell, 36 Ala. 351; Kelly v. Terrell, 26 Ga. 551; Wilson v. Martin, 1 Denio, 602; Snelling v. Huntingfield, 1 Cromp. M. & R. 20; Cawthorne v. Cordrey, 13 Com. B., N. S., 406; Billington v. Cahill, 51 Hun, 132, 4 N. Y. Supp. 660.

The cases cited, in the main, involved facts substantially identical with those before us. In Scoggin v. Blackwell, 36 Ala. 351, it was held that a contract made on one day to work for a year from the following day was within the statute. In Kelly v. Terrell, 26 Ga. 551, a contract made before Christmas to serve for the next year was condemned. In Wilson v. Martin, 1 Denio, 602, an agreement made in April for hire for one year from May 1st thereafter met a like fate. In Banks v. Crossland, L. R. 10 Q. B. 97, an agreement entered into on the 11th of November, the execution of which was to com-

mence the following day and performance to continue for a year thereafter, was likewise condemned. In Snelling v. Huntingfield, 1 Cromp. M. & R. 20, a proposal made July 20th by one person to another for the latter to enter the former's service for the period of one year, accepted by such other July 24th solely by his act of then commencing to serve, was held to date from the 20th and to be void under the statute. In Cawthorne v. Cordrey, 13 Com. B., N. S., 406, an agreement made on March 24th for a year's service to commence March 25th was saved, but there was evidence warranting the jury in finding that there was a second contract made for a year's service on the 25th.

There are authorities holding that contracts for personal sevices are not within the statute, since only those are which cannot be performed within a year, not those which may be
79 contingently terminated. It is reasoned that since the death of a servant ends his term of service without breaking his contract, though in form not to be performed within a year it may be so performed: Hill v. Jamieson, 16 Ind. 125, 79 Am. Dec. 414. Though the death of the servant has the effect stated, leaving the employer liable upon the contract for the time service was actually rendered, it is held generally that contracting parties are not presumed to have in mind the termination of the agreement in that way, and that the mere legal effect, as to excusing full performance, will no more take the case out of the statute than would any other act having like effect. Such a case differs from that where one contracts to render continuous service terminable upon a stipulated contingency, as to support another for the remainder of his natural life. Such a contract is not within the statute because by its terms it ceases with the death contemplated: Heath v. Heath, 31 Wis. 223. Ordinary contracts for personal services are not affected by that rule according to the great weight of authority: Browne's Statute of Frauds, 5th ed., secs. 282a, 282b. So it will be found that in cases involving such services the statute is applied regardless of the fact that the legal effect of the servant's death is to terminate the agreement: Cohen v. Stein, 61 Wis. 508, 21 N. W. 514; Draheim v. Evison, 112 Wis. 27, 87 N. W. 795; 20 Am. & Eng. Ency. of Law, 47, 48, and notes; 29 Am. &. Eng. Ency. of Law, 943, and notes.

Partial performance of a contract void under the statute of frauds does not save it. Either party can terminate the

services at any time and the employé recover, as he did in this case, the reasonable value of the work done: Cohen v. Stein, 61 Wis. 508, 21 N. W. 514; Salb v. Campbell, 65 Wis. 405, 27 N. W. 45; Koch v. Williams, 82 Wis. 186, 52 N. W. 257; Martin v. Martin's Estate, 108 Wis. 284, 81 Am. St. Rep. 895, 84 N. W. 439; Draheim v. Evison, 112 Wis. 27, 87 N. W. 795.

The finding against defendant on the question of whether, in a former action between the parties, plaintiff sought to enforce the claim sued on here, and there was a judgment against 80 him in respect thereto, does not appear to be against the clear preponderance of the evidence. True, the evidence is not very clear in support of the finding, but that is not essential to such support since there is credible evidence to sustain it. Unless the evidence, as preserved in the record, so clearly preponderates against the decision as to indicate pretty clearly that for some reason material evidence was overlooked or was not properly considered, which reasonably might change the result, the finding must stand. All reasonable presumptions are to have their due weight in favor of the trial court's decision. In that light the preponderance of the evidence against a finding must be such as to produce conviction here to a reasonable certainty that it is wrong, else it is to be deemed a verity: Endress v. Shove, 110 Wis. 141, 85 N. W. 651; Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798.

We shall not extend this opinion for the purpose of carefully analyzing the evidence and indicating the weight which it seems the same is entitled to. Suffice it to say, in our view, the indications are that respondent in a former action sought at first to recover forty-four dollars and fifty cents, thirty-nine dollars of which was for the claim mentioned in the complaint in this action. Before the trial such claim was withdrawn by an amendment to the complaint, which the court permitted, and proof was then made of the remaining indebtedness of five dollars and fifty cents, and judgment was rendered therefor.

By the COURT. The judgment is affirmed.

An Oral Contract for Personal Services not to be performed within one year from its execution is generally regarded as within the statute of frauds, and therefore unenforceable: Lee v. Hill, 87 Va 497, 24 Am. St. Rep. 666; Meyer v. Roberts, 46 Ark. 80, 55 Am. Rep. 567. An oral contract for service to begin as soon as the employé

could, and actually beginning a week after the agreement, has been held within the statute: Sutcliffe v. Atlantic Mills, 13 R. I. 480, 43 Am. Rep. 39. But a verbal contract for a year's service to begin on the day following that on which the contract is made is held not within the statute in Dickson v. Frisbee, 52 Ala. 165, 23 Am. Rep. 565. In Indiana, it is held that a contract for personal services, which might terminate with the death of the perso making it, for an indefinite period or for a term of years, is not within the statute of frauds: Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289. And in Carnig v. Carr, 167 Mass. 544, 57 Am. St. Rep. 488, it is held that a contract to furnish permanent employment is not within the statute, because it can be completely performed within a year.

PERELES v. GROSS.

[126 Wis. 122, 105 N. W. 217.]

SURVEYS, LOCATION OF.—When Direct Evidence of Stakes and Monuments Set by the Surveyor as Marking the Boundaries of the Land cannot be Found nor testimony procured of a witness to show the lines run, the next in directness in the line of the evidence is that of an occupation commenced by persons having knowledge as to the place of the original location, or at a time when the original stakes were still in place. Failing in that, the next evidence in conclusiveness is the courses and distances declared in the plat and connecting the points in question with some other point, the actual location of which can be ascertained. (p. 905.)

SURVEYS—Plats Declaring Distances, When Control.—Where there is no direct evidence as to the place of physical location on the ground of the line or point in question or of any intervening point, the declaration of the plat that it is so many feet in a given direction from the starting point must control in the absence of other physical marks inconsistent with that result. (pp. 905, 906.)

SURVEYS—Plats Declaring Distances, When not Controlled by the Scale of the Plat.—The declaration of distance shown by a plat is not to be rejected for the purpose of adopting the length of the line as it appears by measuring on such plat by the scale appearing thereon, especially when the scale is so small that the very width of a line drawn thereon is a foot or more. (p. 906.)

SURVEYS—Plats—Space to be Given to the Last Dimension When it is not Designated.—When, in subdividing a line or space, the surveyor declares the dimensions he has given to each subdivision except the last, and there leaves an irregular space without designating its dimensions, he is presumed to have thrown all the remainder, much or little, into that irregular and unmeasured portion. (p. 906.)

SURVEYS.—In Resurveying a Tract of Land According to a Former Plat or Survey, the surveyor's only function or right is to relocate, upon the best evidence obtainable, the courses and lines at the same place where originally located by the first surveyor on the ground. Any departure from such purpose and effort is unprofessional, and, so far as any effect is claimed for it, is unlawful. (p. 906.)

SURVEYS—Plats—Picture of Lines of Streets, When not Controlling.—The fact that the lines of streets on the northeasterly side of W. street as shown on a plat coincide with extended lines thereon of streets south of W. street does not necessarily establish the coincidence of the lines of streets on the two sides of W. street as against statements of distances contained in the same plat, and the fact that the streets on the north side, being wider and running at different angles, could not exactly correspond with the lines of the streets on the south. (p. 907.)

SURVEYS—Plats—Actual Occupation, When not Controlling in Construction of.—Practical location and use and occupation, in order to be evidence of original location, must be open to the inference that it commenced with some reference to the original survey lines or markings, and cannot prevail when clearly referable to a mistaken or deluding subsequent survey. (pp. 907, 908.)

SURVEYS AND PLATS—Question for the Jury.—When the inferences to be drawn from a plat or survey and from the location and use of the property intended to be represented thereon are conflicting, the court cannot take from the jury and determine, as a matter of law, the location of the lines represented on such plat. (p. 908.)

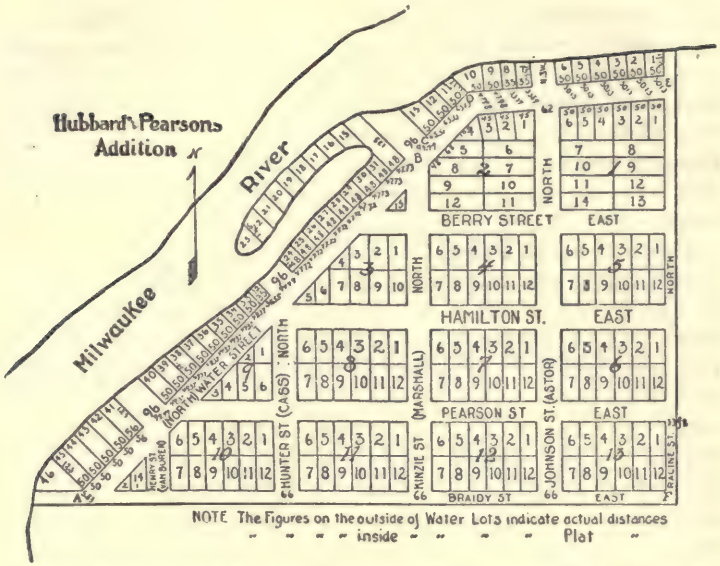
RES JUDICATA.—When Two Actions Involve Different Subject Matters, though between the same parties, a judgment in one is in the other conclusive only as to the matters actually adjudicated, and not upon any question which might have been, but in fact was not, considered. (p. 909.)

RES JUDICATA—Judgment, When Conclusive Though the Subject Matters were Different.—When in a litigation about the distribution of a fund it becomes necessary for the court to find where a boundary line is, and this finding can only be based on the trial of the question involving some form of evidentiary proof, the finding and the judgment of the court on the question are conclusive of the same question in a subsequent action of ejectment between the same parties and their privies. (pp. 909, 910.)

ESTOPPEL IN PAIS in Favor of Mortgagee, When does not Protect Purchaser at a Foreclosure Sale.—Though a mortgagor may, as against his mortgagee, have estopped himself from denying that the mortgaged premises included a certain building, this estoppel will not avail a purchaser at a sale under such mortgage who was not misled at the time of his purchase in supposing that the land bid for or the deed he received included anything except the land described in such deed. (pp. 910, 911.)

IN EJECTMENT the Plaintiff Must Stand on His Legal Title. (p. 911.)

Ejectment for thirty-four and ninety-six hundredths feet of land which the plaintiff claimed to be the north half of lot 43 and the adjoining nine and thirty-six hundredths feet of lot 42 of Hubbard & Pearson's addition to Milwaukee. The following is a copy of such plat so far as material to this controversy:



There appeared to be no controversy respecting the location of points A and E designated on the plat. The extent of the water frontage of lot 46 was a point of contention on the trial. On the original plat the narrow frontage is shown measuring according to the scale therein about five and eighty-three hundredths feet, but no length of that line is marked on such plat. The city engineer, in 1876, undertook to locate the water lots and the intervening streets to the river, and, disregarding all distances indicated on the original plat, gave to the various lots and streets the dimensions marked in the figures below the lot lines on North Water street, and found that the distance from the northeast line of lot 46 to the point E exceeded the total of the figures on the original plat by thirty-seven and ninety-six hundredths feet, subject to the question whether the north end of Johnson street should be sixty-six or sixty-two feet. If sixty-six feet, the surplusage would be four feet less. The defendants insisted that the various lots and streets should be given the dimensions accorded them upon the original plat, and the resulting surplusage of from thirty-five to forty feet should all be cast upon lot 46, whose frontage was unmarked. The contention was rejected by the trial court, on the theory that it was apparent from the plat that the ends of the streets running at right angles from North Water street to the river, were to

correspond with the north and south streets in the body of the plat, which result was nearly accomplished by the survey made in 1876. The court, therefore, held, as a matter of law, that such survey was correct, and this left all the lots southwest of the extension of Van Buren street to correspond with their dimensions as designated on the original plat and lot 46 with five and eighty hundredths feet of frontage only, and to include the ground in controversy.

The defendant also relied upon estoppel by judgment, and in support of this contention showed that in 1882 the extension of Van Buren or Henry street was vacated, and that the city, overlooking this fact, in 1889 proceeded to build an elevated viaduct from the intersection of Van Buren and Brady streets across the river, following the center of the extension of that street northwesterly to North Water street, according to the city survey, and that thereupon the owners of lot 41, by virtue of the vacation of the southwest half of Van Buren street, commenced suit against the city for damages, which they recovered upon, and holding that the vacation of the street was valid, that they were the owners to the center thereof, and that the whole viaduct was within the limits of the title; and they were awarded damages for the taking of the forty-six feet occupied by the viaduct. The south line of this viaduct was two hundred and eighty-six and seventy-five hundredths feet from the southwest corner of lot 46, marked on the plat as point A. Prior to the judgment, the plaintiff, with others as trustees of the Shape estate, had obtained from the defendants and their predecessors a mortgage upon lots 41 and 42, the northeast half of 46, and the half of the vacated street northeast of 41. This mortgage being foreclosed during the litigation, the mortgagees, before sale, demanded payment of the damages to them, and, other claims being made, all parties interested, upon application of the city, including these plaintiffs and the defendant and his associate trustees, were interpleaded. The mortgagees under their judgment demanded payment to them on the ground that their mortgage included the premises covered by the viaduct. A sale under the mortgage was then made to the plaintiff, who appeared in and became a party to the proceeding for the distribution of damages. The court finally determined in favor of the mortgagees by finding that the viaduct was entirely on the mortgaged premises and to the southerly line thereof six feet southerly from the northerly line of lot 41. In the present ac-

tion, the trial court held that this created no estoppel against the plaintiff, and directed verdict in his favor for the premises described in the complaint as commencing one hundred and thirty and eighty-three hundredths feet northeast of the southeast corner of lot 46 and extending northeasterly along North Water street thirty-four and thirty-six hundredths feet. The defendants appealed.

Timlin & Glicksman, for the appellants.

Turner, Hunter, Pease & Turner, for the respondent.

[127] DODGE, J. 1. The first question is purely one of fact, and is, Where did the original surveyor in 1838 locate on the ground the northeasterly and southwesterly lines of water lot 43? For the boundary of plaintiff's ownership, according to his deed, is midway between these two lot lines. Of course, the most direct evidence would be the very stakes or monuments which that surveyor set as marking the boundaries of this lot, or the testimony of eye-witnesses, who saw the lines actually run upon the ground. Next in directness would be occupation commenced by persons having knowledge as to the place of original location or at a time when the original stakes were still in place: Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599; Koenigs v. Jung, 73 Wis. 178, 40 N. W. 801; Racine v. Emerson, 85 Wis. 80, 39 Am. St. Rep. 819, 55 N. W. 177. Failing both of these, the next evidence in conclusiveness is the courses and distances declared in the plat as connecting the spots in question with some other point, the actual location of which can be ascertained. When this method is necessary, numerous [128] possibilities of error and confusion arise, for measurements of distance and running of courses involve care and accuracy of human action and adjustment of the instruments used; hence the possibility, if not probability, that the instruments used and the care and observation exercised by the original surveyor were not identical with those applied in a subsequent survey. From the frequency of such difficulties have grown up numerous rules for resolving and adjusting discrepancies, based upon experience as to the manner in which mistakes and inaccuracies most frequently arise. Where, however, there is absolutely no direct evidence as to the place of physical location on the ground of the line or point in question or of any intervening point, the declaration of the plat that it is so many feet in a given direction from the starting point must control, at least

in absence of other physical facts inconsistent with such result. On the plat in question the original locations of points A and E seem to be undisputed. The distance and direction of each intervening lot and street boundary from the point E is stated, while the distance from the point A is not stated, because the frontage of water lot 46 is not declared. At this point it is as well to refer to the curious dignity ascribed to this unmarked space by the city surveyors, upon whose so-called resurveys the plaintiff's case largely rests. By measuring this line upon the original plat, which is on a scale of two hundred feet to the inch, they conclude that this space is five and eighty-three hundredths feet, although the scale of the map is so small that the very width of the lines as drawn thereon is a foot or more. To the thus ascertained length of this line they accord such conclusiveness as to warrant repudiation of the declaration of the surveyor as to the length at which he in fact laid out many of the other lot lines, changing some of them nearly one-third, viz., from fifty to sixty-five and fifty-one hundredths feet. This is complete perversion of the rule, founded on both reason and authority, that when, in subdividing a line or space, the surveyor declares the dimensions which he had given to each of [129] the subdivisions except the last, and there leaves an irregular space without designating its dimensions, he will be presumed to have thrown the remainder, much or little, into that irregular and unmeasured portion: Pereles v. Magoon, 78 Wis. 27, 23 Am. St. Rep. 389, 46 N. W. 1047; Baldwin v. Shannon, 43 N. J. L. 596. That results from the well-established rule in treating plats that there is more probability of error in measuring a long line than a short one. Besides this, the attempted picture of a tract of land by way of a small plat has but little significance against the stated angles, courses and distances which the surveyor declares to have controlled his survey of the ground.

Much of confusion as to location of lines in this locality results from a so-called resurvey made by the city surveyor in 1878. In resurveying a tract of land according to a former plat or survey, the surveyor's only function or right is to relocate, upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground. Any departure from such purpose and effort is unprofessional, and, so far as any effect is claimed for it, unlawful. To fix lines variant from the originals and ac-

cording merely to his notion of a desirable arrangement of lots and streets leads naturally to confusion of claims among lot owners, and when done by a city surveyor as a basis for occupation of land for streets, is attempted confiscation. The evidence shows that in the city survey nothing was found on the ground to show where any of the subdivisions between the points A and E were originally located; also, that the surveyor proceeded, while retaining the same number of lots, to give those lots such arbitrary width as he saw fit, with the purpose and result of making the lines of the streets on the northeast side of Water street coincide with the extended lines of the north and south streets. The resurvey is therefore wholly valueless, and not even evidentiary, unless it be found as a fact that such coincidence of street lines did in fact exist [130] in the original survey. The trial court apparently directed verdict for plaintiff on the ground that such fact was established, and established conclusively and without dispute, else it could not properly be withdrawn from the jury. This ruling sharply presents the error assigned under this branch of the case. The trial court based its conclusion in a written opinion, upon the picture presented by the original plat, whereby approximate coincidence of street lines apparently exists, but this was only one piece of evidence. Opposed to it were several other circumstances. There was the declared fact that the streets to the river, at right angles with Water street, were surveyed ninety-six feet wide, but the lines of such a street could not exactly correspond with the lines of a sixty-six foot street intersected by Water street at an angle of forty-five degrees, for such lines would be less than ninety-three and five-tenths feet apart on such hypotenuse. Again, as already stated, the aggregate width certified to have been given the lots on the ground rendered such location of the streets impossible, though it would not wholly remove the short streets to the river from connection with the north and south streets so but that passage across Water street from the latter to the former would be practicable. Thus it clearly appears that the absolute coincidence of the street lines was a disputed question. Respondents' counsel present, as further support for the court's ruling, use and occupation according to such street lines. Practical location or use and occupation, in order to be evidentiary of original locations, must be at least open to the inference that it commenced with some reference to original survey lines or markings: Racine v. J. I. Case

Plow Co., 56 Wis. 539, 14 N. W. 599; Racine v. Emerson, 85 Wis. 80, 39 Am. St. Rep. 819, 55 N. W. 177. All occupation and use subsequent to 1878, whether by the city or by owners, is clearly referable to the deluding resurvey of that date. Prior to that time no travel from Water street northwestward to the river is shown on any of the streets except Marshall street. That, however, is not [131] located with any exactness, and, until the buildings hereafter mentioned, was over unoccupied commons. No occupation by property owners is shown until "late in the sixties," when a mill building was erected on lot 14, whose foundation now corresponds closely with the northeast line of that lot as claimed by plaintiff. At about the same time a small residence was built on lot 13. That was located near what the plaintiff claims to be the northeast line of the lot and remote from the street line, but would apparently have approximated the latter line, as claimed by defendants. At about the same date as the mill above mentioned a house was built by the owner of lot 41, still in existence, the whole of which is northerly of the lines of that lot and extends some twenty feet into Van Buren street, as same is claimed by plaintiff. The significance of these several structures depends on whether they were apparently attempted to be built according to lot lines, and whether there is probability that their builders had any better means of knowledge then, some twenty-five or thirty years after the plat, than exists now as to the true location of those lines. There is no evidence of the existence of either marks or memory, and the lapse of time had been such as to throw doubt upon their persistence on the immediate banks of the river. All this situation thus presented a very obvious case of conflicting inferences, not proper to be withdrawn from the jury. We must therefore conclude that error was committed in directing the verdict.

2. If, upon new trial, the jury should reach the same conclusion as did the court in this, there would still remain the question of plaintiff's estoppel to contend for such a location of the premises described in his deed as to include the strip in dispute. In a somewhat complicated litigation about the distribution of a fund which had become substituted for a forty-six foot strip of land, claimed by the plaintiff's grantors to be part of their mortgaged premises, the court expressly found that the southerly line of that strip was six feet south of the [132] northerly line of lot 41. The location of that southerly

line of the viaduct two hundred and eighty-six and seventy-five hundredths feet northeast of the point A was entirely certain and undisputed in that case as in this. The exact location of that strip with reference to the lines of ownership of the various other parties and their successors in title was material, because a part of the relief sought and granted by the judgment consisted in barring them from all further claim in the land for which the money deposited by the city was in fact payment. No question of privity needs discussion, for all the parties to the instant action were parties to that. However, the present action involves a different subject matter than the former; hence that judgment is conclusive only as to matters actually adjudicated therein, and not upon questions which might have been considered but in fact were not: Wentworth v. Racine Co., 99 Wis. 26, 74 N. W. 551; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589. The somewhat vexed inquiry whether a question, in order to be concluded as a thing adjudged upon a different cause of action, must have been so the subject of contention that the court did in fact actively and consciously consider and decide it, or whether it suffices that the question was so present to the former litigation that the judgment necessarily affirmed or negatived, although the court may in fact have merely assumed the existence of the fact in absence of contention over it, we need not attempt to consider or decide. Typical cases in support of the latter view are Van Valkenburgh v. Milwaukee, 43 Wis. 574, Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, while Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195, gives some support to the former contention. Text-book discussion will be found in 1 Freeman on Judgments, sec. 330; 1 Van Fleet on Former Adjudication, c. 8. We deem it clear that, even within the more limited version of the rule of res adjudicata, the question of the relative location of the northerly line of lot 41 and the southerly line of the viaduct was litigated and decided. We have already pointed out that it [133] was material to the relief sought and granted and that the court declared its express determination of it. That finding could properly have been based only on a trial of the question involving some form of evidentiary proof, for no mutuality of allegation or admission established the fact. True, plaintiff and his associates alleged it, but the city did not admit it. Its pleading merely conceded that its forty-six foot strip was all southerly of the

center of the street, which was forty-eight feet northerly of the lot line, and the pleadings of most of the other parties went no further. This finding we deem conclusive proof that the court did receive proof of some kind and judicially consider and determine upon the subject which, by the pleadings, was submitted to it. That being so, its determination is conclusive upon all the parties whenever the same question comes up between them, whatever may be the subject or the form of the later litigation: Van Valkenburgh v. Milwaukee, 43 Wis. 574; Wentworth v. Racine Co., 99 Wis. 26, 74 N. W. 551; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; Hart v. Moulton, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. Rep. 733, 39 L. ed. 859. This judgment, therefore, conclusively established, as against all parties to this action, that the northeast line of lot 41 is two hundred and ninety-two and seventy-five hundredths feet from the known point A, and that any construction of the plat which would make that line coincide with the intersection of the extended west line of Van Buren street with the northerly line of Water street is incorrect. Starting with this fact, there is no evidence to contradict the declaration of the original plat as to width of lots 41, 42, and 43, any discrepancy in the apparent but undeclared frontage of lot 46 not serving as any contradiction: Pereles v. Magoon, 78 Wis. 27, 23 Am. St. Rep. 389, 46 N. W. 1047. Hence upon the evidence as it stands in the record, plaintiff's southerly line is one hundred and sixty-one and seventy-five hundredths feet northeast from the monument at A, thus excluding from his ownership thirty and ninety hundredths feet of the land claimed, and including three and forty-four hundredths feet thereof.

3. A claim is made that defendants are estopped to deny [134] plaintiff's title to the thirty-four and thirty-six hundredths feet described in the complaint, because the agent for their grantor, while negotiating for the loan by the trustees of the Shape estate, stated to plaintiff, as trustee, that the premises proposed to be mortgaged included a building which confessedly extended over the land in dispute. There is no evidence that even the trustees were misled into supposing that the description of land which was finally written into the mortgage covered this land to the southward. They could hardly have believed that and also believed that it covered the buildings lying northerly of lot 41, which were in the said

statement also declared to be offered for mortgage. What ever may have been the effect of such statement on the mortgagees, however, there is no evidence that plaintiff was misled at the time of his purchase at foreclosure sale into supposing that the land he bid for, or the deed he received, covered anything except the land actually described therein. He then knew all about the claim that lot 41 commenced six feet north of the south line of the viaduct. He had joined in a petition asserting that fact. He knew the dimensions of lots 41, 42 and 43. He knew when he took his deed of lot 42 and half of lot 43 that such deed could convey only what it described. If, by reason of the statements to them, the trustees had acquired the equitable right to hold thirty feet of land outside of that described in their mortgage, they had taken no step to do so, and they had not conveyed any such right or land to plaintiff. He must stand on his legal title in an action of ejectment, and he has shown no legal title passing to him beyond the description in his deed. Besides this, there is nothing to show that the defendants, though grantees of Leopold Gross, are chargeable with any equities that may have existed against him or any notice, at the time of their purchase, that the mortgagees claimed beyond the limits fixed in their recorded mortgage.

By the COURT. Judgment reversed, and cause remanded for new trial.

For Authorities upon the boundary questions involved in the principal case, see the recent monographic note to Washington Rock Co. v. Young, 110 Am. St. Rep. 677-695.

SMITH v. PFLUGER.

[126 Wis. 253, 105 N. W. 476.]

MORTGAGE, Deed Absolute in Form may be Shown to be.—A bill of sale or a deed absolute in form may be shown to be a mortgage in an action at law. (pp. 912, 913.)

MORTGAGE Conveyance Absolute in Form, When Deemed to be a.—The mere form of an instrument cuts very little figure in respect to whether it is enforceable as a mortgage or not, upon its character being questioned in either a legal or an equitable action. If its purpose is security, and this is established in any action involving the subject, the instrument is treated as a mortgage and nothing else. (p. 913.)

MORTGAGE, Parol Evidence to Show that a Deed Absolute in Form is.—In code states, where what were formerly actions at law

and suits in equity are triable in the same court, the true character of a conveyance absolute in form given as a mortgage may be shown by evidence aliunde, including parol evidence. (pp. 914, 915.)

CONTRACT Between Two Persons for the Benefit of a Third.—An agreement made by one person with another for the benefit of a third is binding, regardless of the relations between such other and the third person. Upon the making of the agreement between such person and such other, the law, operating upon the acts of the parties, creates the essential privity between such other and the third person necessary to a binding contract between them. (p. 918.)

Action on contract. The contention of the plaintiffs was that Peter Pfluger, being indebted to the plaintiff and various others, sold some cooperage machinery to John Pfluger for fourteen hundred dollars, and the latter agreed to pay the purchase price to specified creditors of the vendor, including plaintiffs, so far as necessary to discharge the indebtedness due such creditors; that the property sold was delivered to the vendee, but transferred in the form of a bill of sale to the C. & J. Michel Brewing Company as security on account of its having aided in obtaining money to pay for the goods; that the defendant paid accordingly all the creditors of Peter Pfluger except plaintiffs, who, therefore, sued herein for their debt, amounting to $643.65.

The defendant insisted on the trial that though there were some negotiations for the sale by Peter Pfluger to John for the sum of fourteen hundred dollars, the consideration to be paid to the latter's creditors, that no trade of that sort was consummated, but, on the contrary, that all idea thereof was abandoned and the property sold by Peter Pfluger to the brewing company, which in turn sold to the defendant. There was evidence tending to sustain the contention of the respective parties, but the court directed a verdict in favor of the plaintiffs.

C. L. Hood, for the appellant.

Doherty & Baldwin, for the respondents

255 MARSHALL, J. Complaint is made by appellant because the court referred to the bill of sale to the brewing company and the receipt taken by it from appellant, showing such company's only claim upon the property to be for security, as a mortgage. Counsel seem to suppose that an instrument, in form an absolute conveyance, cannot be shown to be anything else except by judicial interference in an equitable action. Such is not the general rule, especially in juris-

dictions where [256] the distinctions between actions at law and suits in equity have been abolished.

The mere form of an instrument cuts but very little figure in respect to whether it is enforceable as a mortgage or not upon its character being called in question in a legal or equitable action, as those terms are used under our system. The purpose of the instrument is the controlling feature under all circumstances. If that is security and the facts of the matter are established in any action involving the subject, the instrument is treated as a mortgage and nothing else: Starks v. Redfield, 52 Wis. 349, 9 N. W. 168; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322; Schriber v. LeClair, 66 Wis. 579, 29 N. W. 570, 889; McCormick v. Herndon, 86 Wis. 449, 56 N. W. 1097; Schierl v. Newburg, 102 Wis. 552, 78 N. W. 761; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937.

In the majority of instances here and elsewhere, which have been reported in the published reports, where the rule permitting admission of parol evidence to show that an instrument purporting on its face to be an absolute deed or bill of sale, to have been intended by the parties thereto to be a mortgage, the law in that regard was applied in cases formerly cognizable only in courts of equity, and expressions were used well calculated to mislead one stopping short of a thorough study of the subject into the belief that a court of equity only can give effect to the true purpose of the instrument. The contrary has been established here by a long line of decisions. The following are but a few of them: Kent v. Agard, 24 Wis. 378; Andrews v. Jenkins, 39 Wis. 476; Brinkman v. Jones, 44 Wis. 498; Howe v. Carpenter, 49 Wis. 697, 6 N. W. 357; Dobbs v. Kellogg, 53 Wis. 448, 10 N. W. 623; Manufacturers' Bank v. Rugee, 59 Wis. 221, 18 N. W. 251; Lamson v. Moffat, 61 Wis. 153, 21 N. W. 62; Gettelman v. Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627; McCormick v. Herndon, 86 Wis. 449, 56 N. W. 1097; Jordan v. Estate of Warner, 107 Wis. 539, 83 N. W. 946.

[257] In Howe v. Carpenter, 49 Wis. 697, 6 N. W. 357, the court laid down the rule thus: "Under the repeated decisions of this court it is held that no matter what the nature of the conveyance may be, which is given as security when the evidence, either written or parol, establishes the fact that the relation of mortgagor and mortgagee exists between the parties, the right of the former is limited to a mere mortgage interest."

In Kent v. Agard, 24 Wis. 378, the point was made that equity jurisdiction only was competent to give effect to a written instrument as a mortgage contrary to its letter, and the court speaking by Mr. Justice Paine said: "I see no reason why" the real character of the instrument intended as a mortgage cannot be shown regardless of its letter "in an action to recover possession of real estate. When the facts are proved, such a deed is a mortgage only, both at law and in equity. The rights of the mortgagor and mortgagee are precisely the same as though the defeasance were contained in the deed itself. The only difference is in the manner of proving the defeasance."

There are authorities, it is true, making a distinction in regard to the rule under discussion as between a conveyance of land and one of personalty, but no such distinction is recognized here (Manufacturers' Bank v. Rugee, 59 Wis. 221, 18 N. W. 251), nor by courts generally: Herman on Chattel Mortgages, sec. 21, and cases cited in the note.

It should be said, perhaps, that there is ample authority sustaining the general proposition contended for by counsel for appellant: See Jones on Chattel Mortgages, 4th ed., sec. 21; 20 Am. & Eng. Ency. of Law, 2d ed., 935-949. But the contrary has so long prevailed here and has been so frequently and so recently treated at length in our decisions that there is little need of going astray in respect to the matter. In Jordan v. Estate of Warner, 107 Wis. 539, 83 N. W. 946, the subject was treated thus: "The great weight of authority in this country, where the subject is not regulated by statute, including that of the supreme [258] court of the United States, is that, whatever form a conveyance of real estate may take, it may be shown in equity, by parol, to be a mortgage, if that was its purpose in fact; and in code states, where what were formerly actions at law and suits in equity are triable in the same court, the distinctions between them having been abolished, the true character of a conveyance, absolute in form, given as a mortgage, may be shown by evidence aliunde, including parol evidence, whether the question be raised by a direct action for equitable relief or be incidental to legal relief. An examination of [the cases decided by this court] will show that no discrimination is made between legal and equitable actions as to the jurisdiction of the court."

The doctrine that the giving effect to an instrument according to the intention of the parties thereto, which in form is

an absolute conveyance, though intended as security, is a subject of equitable cognizance only, originated in the supposed difficulty of dealing in courts of law with the matter, because of the statute of frauds and the rule that a written instrument cannot be contradicted or varied by parol. Equity courts dealt with the matter upon various pretexts common to such jurisdictions, viz.: that a defeasance was omitted by fraud or mistake or mutual confidence and that proof of the real nature of the transaction was necessary to prevent fraud; that in such cases neither the statute of frauds nor the rule against varying a written instrument by parol stood in the way. In some legal opinions expressions may be found which might well lead one to suppose that the doctrine permitting parol evidence regardless of the forum or form of action in such cases is a partial abrogation of one of the most familiar and important rules of evidence. Such expressions are unfortunate and misleading. This court in speaking on that subject in Jordan v. Estate of Warner, 107 Wis. 539, 83 N. W. 946, said: "The rule is not inconsistent with the statute of frauds nor the principle that a written contract cannot be varied by parol, though statements to the contrary are sometimes found in the books, including some of the decisions of this court. [259] It recognizes and gives effect to two very familiar elementary principles of evidence, namely, parol evidence may be resorted to to prevent the inequitable or fraudulent use of a written instrument; and, a written instrument, made in part execution of an entire verbal contract and covering some essential part of it, does not preclude showing the entire contract by a resort to parol evidence."

That is the only logical basis for treating, by the aid of parol evidence, an instrument according to the purpose mutually intended regardless of the letter of the paper. It is confusing to read commonly in legal opinions that a written contract cannot be varied or contradicted by parol evidence, and to read in exceptional instances the contrary, the conflicting expressions being made without such qualifications as to indicate clearly the sense in which they were intended. Where ambiguity in a contract exists, which is developed by applying the paper to the subject dealt with, proof of the circumstances under which it was made to enable the court to construe it as the parties intended, or proof by parol of that part of an entire contract which in partial execution was in the other features reduced to writing, should not be denominated

variances or contradictions of the agreement. Construction often involves variation or contradiction of the strict letter, but not of the real contract itself, as expressed in the paper when viewed in the light of all the circumstances of its origin. The words "varied or contradicted" in the treatment of this subject in Lippincott v. Lawrie, 119 Wis. 573, 100 Am. St. Rep. 876, 97 N. W. 179, referred to the letter of the contract, not to the meaning thereof reasonably determinable therefrom in the light of all the facts.

The court after stating the claim of the plaintiffs, that John Pfluger, in the transaction whereby he acquired the property described in the bill of sale, agreed to pay therefor by paying certain specified debts of Peter's, including that of Smith & Johnson, and that there was evidence to the effect that fifteen hundred dollars was borrowed of the German American Bank by aid of the brewing company for John Pfluger's use in carrying [260] out his agreement, and that so much thereof was so used as was required to pay such debts, with the exception of Smith & Johnson's—said to the jury, following a recital of the particular debts of Peter's that were paid:

"This makes something like, according to his (Peter's) testimony, $885, which he (John) paid at that time. Now it comes down to this: Peter Pfluger insists and maintains that it was his understanding that the debts were to be paid, not only the debts that were paid at that time, but also this debt of $643.65 to Smith & Johnson." (The words "at that time" clearly refer to the time when the transaction was closed up,—the time when the debts to other creditors were paid.) "Now if that was the understanding between Peter Pfluger and John Pfluger at the time this was closed up, or at any time during these transactions, ... it is for you to consider and determine, under all the evidence, whether it was understood and agreed that he should pay Smith & Johnson's debts as well as the others, which he did pay." (The jury must have understood that it was for them to determine whether, as Peter testified, when the trade was closed up and his other debts mentioned were paid by John, it was understood and agreed that Smith & Johnson's debt should also be paid.)

Immediately following the quoted words the court said: "Now if that was the understanding of the parties at the time, then the plaintiffs are entitled to recover." It is contended

on behalf of appellant that the jury were thus permitted to find in respondents' favor, if there was any understanding at any time during the transactions resulting in John Pfluger acquiring the property, even though it was superseded by an agreement with the brewing company in the end.

The charge is by no means a model of clearness. It is justly criticised by counsel for appellant. Yet it seems that the court intended to have the jury understand that if, as testified to by Peter Pfluger, at the time the property was delivered to John Pfluger the latter agreed to pay therefor in part by paying certain debts of Peter's, including one to Smith & Johnson, they were entitled to recover. In all reasonable [261] probability the jury so understood the court. The words "at that time" in all reason go back to the same words in the statement by the court of Peter's evidence, which unmistakably refer to the closing up of the deal when certain debts of Peter's were paid. The word "understood," used in the charge in connection with "agreed" and sometimes not, clearly referred to the understood conditions of the sale by Peter—in form to the brewing company, but in effect to John—forming a part of the transactions between them, leading up to and affecting the final close, whether specifically mentioned at the end or not.

Error is assigned because the court left it to the jury to determine whether John bought the property or not. We do not see that clearly. The jury were instructed that whether John bought the property for fourteen hundred dollars or fifteen hundred dollars made no difference if he agreed to pay the Smith & Johnson claim on account thereof. There was no question for the jury as to whether "John bought the property or not," as counsel for appellant suggests. Not because the bill of sale on its face shows that the transfer was to the brewing company, however, but because the conceded evidentiary facts show beyond controversy that the sale was to John, and that the transfer to the brewing company was a mortgage.

It is contended that the court erred in instructing the jury that a mere oral promise on the part of appellant to pay Peter's debts, under the circumstances, was binding. It is argued that there can be no binding contract in such circumstances without all the elements of novation being present, viz., as applied here—a debt from Peter to Smith & Johnson, a debt from John to Peter, and an agreement between the

three whereby Smith & Johnson released Peter and took John in his stead in consideration of the latter's agreement to pay Peter's debt to them. It does not seem necessary to discuss at length the doctrine of novation, which is invited by the learned counsel's somewhat extended treatment of the matter. [262] Counsel on both sides, as suggested on the oral argument, misconceived the law applicable to the case in giving so much attention to the subject of novation. There is little need, it would seem, for confusing such subjects with that of an agreement by one person with another for the benefit of a third. Such an agreement is binding regardless of the relations between such other and the third person, and of whether such other was a party to, or had knowledge of, the agreement when made or of the continuing existence of the indebtedness of such person to such other, if such indebtedness is a circumstance of the transaction. Upon the making of an agreement between such person and such other, the law operating upon the acts of the parties creates the essential of privity between such other and the third person, necessary to a binding contract between them. The law on this matter has been so fully discussed in recent years that it would be a work of supererogation to go over the matter again. The doctrine is firmly established here, as concisely stated in the syllabus of the decision in Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003, 93 N. W. 440, 61 L. R. A. 509: "If a person makes a contract with another for the benefit of a third person, the latter may enforce it at law, regardless of his relations with the first person or whether he had any knowledge of the transaction between such person and such other at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action."

The law, as above indicated, was fairly stated by the trial court to the jury. The misconception of it on the part of counsel for appellant seems to be at the foundation of the assignments of error chiefly relied upon. We are unable to discover any harmful error in the record.

By the COURT. The judgment is affirmed.

A Deed Absolute on Its Face may be shown to be a mortgage (McFarlane v. Louden, 99 Wis. 620, 67 Am. St. Rep. 883; State Bank v. Matthews, 45 Neb. 659, 50 Am. St. Rep. 565; Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160), even by oral evidence: Glass v. Hieronymus, 125 Ala. 140, 82 Am. St. Rep. 225; Keithley v. Wood, 151 Ill. 566, 42 Am. St. Rep. 265; Tower v. Fetz, 26 Neb. 706, 18 Am. St. Rep. 795.

Contracts for the Benefit of a Third Person and his right to sue thereon are discussed in the monographic note to Baxter v. Camp, 71 Am. St. Rep. 176-207. Ordinarily, where a third person is a beneficiary under a contract, he may maintain an action thereon without notice of acceptance or demand, and the commencement of the action is both acceptance and demand: McCoy v. McCoy, 32 Ind. App. 38, 102 Am. St. Rep. 223.

PRESBYTERIAN MINISTERS' FUND v. THOMAS.

[126 Wis. 281, 105 N. W. 801.]

INSURANCE—Place of Contract.—If an application is made out by an insurer in Pennsylvania and sent by mail to an applicant in Wisconsin, who, in that state, fills out and signs the application and forwards it to the insurer's office in Pennsylvania, and directs a policy to issue, and the insurer thereupon issues its policy in the latter state and mails it to the insured in the former, who then signs the note, reciting that it is for the balance of the first premium and is payable in Pennsylvania, the contract of insurance is a Pennsylvania contract. (p. 920.)

INSURANCE, Life, Foreign Contracts Respecting, When Invalid.—If a statute provides that no corporation, association, partnership or individual shall do any business of insurance of any kind or make any guaranty, contract, or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder in this state, or with any resident of the state, except according to the conditions and restrictions of the statute, a contract of insurance made in Pennsylvania by a corporation of that state to a resident of the state where the statute is in force falls within its provisions and is prohibited thereby, and the statute is not in contravention of the constitution of the United States. (p. 921.)

INSURANCE, Foreign, Life.—A State has the Right to Impose Conditions on foreign insurance companies doing business therein when such conditions are not in conflict with the constitution of the United States. (pp. 921, 922.)

CONTRACTS Contrary to the Statutes and the Law of a State will not be enforced by its courts. (p. 922.)

CONTRACTS, Foreign, Comity, When does not Require the Enforcement of.—When a contract of life insurance is made by a Pennsylvania corporation with a resident of Wisconsin which is forbidden by the laws of the latter state, its courts will not enforce such a contract on the ground of comity. Hence, an action cannot be maintained in those courts on a note given for the first premium of such insurance. (p. 923.)

Action to recover on a note given for the first premium on a life insurance policy on the life of the defendant, a resident of Wisconsin. The answer alleged that plaintiff was a corporation incorporated under the laws of Pennsylvania,

having its home office in that state, and not licensed to do business in Wisconsin, and that it had not complied with the statutes of that state. Judgment for the plaintiff for the amount of the note, and the defendant appealed.

Winter & Esch, for the appellant.

George W. Bunge, for the respondent.

[282] KERWIN, J. It is conceded that the plaintiff is a Pennsylvania corporation, and that it never complied with the laws of this state respecting the doing of insurance business herein or the making of contracts with residents of this state. The contention on the part of the defendant to reverse the judgment is that the contract in question was made in Wisconsin, therefore void for the reason that plaintiff had no authority to do business or make contracts in Wisconsin without compliance with our statutes, and that, even if made in Pennsylvania, still it cannot be enforced here. The contract of insurance was made by correspondence, the plaintiff sending its application from its office in Philadelphia to defendant at La Crosse, Wisconsin. Defendant filled out and signed the aplication at La Crosse and forwarded it to plaintiff's office in Philadelphia, offering to take the insurance in accordance with the application, and directing the issue of the policy. In compliance therewith plaintiff issued the policy at its office in Philadelphia and mailed the same to defendant, upon receipt of which defendant signed and mailed to plaintiff a note for the first premium, which note recited that it was for balance of first premium on the policy and payable at Philadelphia. The court below found that the contract was made in Philadelphia, Pennsylvania, and we are inclined to the opinion that it was right in so holding. Defendant's proposition for insurance was accepted at Philadelphia when the policy was issued and mailed to defendant in compliance with the application, and the note in suit given for the first premium, although made and signed in Wisconsin, was payable in Philadelphia, Pennsylvania. We think, therefore, the contract in [283] question was a Pennsylvania contract. While, as a general rule, the construction and validity of a purely personal contract depends on the law of the place where made, if the contract be made in one place to be performed in another, the place of payment and performance is the place of the contract: Brown v. Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205.

We are not concerned here whether this contract could be enforced outside of Wisconsin or not. The question is, Can it be enforced in Wisconsin? Section 1978 of the Statutes of 1898 provides: "No corporation, association, partnership or individual shall do any business of insurance of any kind, or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of these statutes. And the term 'insurance corporation' as used in this chapter may be taken to embrace every corporation, association, partnership or individual engaging in any such business."

This statute is broad and general, and prohibits all persons and corporations from doing any business of insurance or making any insurance contract in this state, or with any resident of the state, except according to the restrictions prescribed by statute. The restrictions and conditions imposed will be found in sections 1220, 1947-1951, 1953, 1954, of the Statutes of 1898, and are provisions in the interest and for the protection of residents of this state against irresponsible insurance companies. Section 1978 of the Statutes of 1898, above quoted, was obviously intended to prevent the making of any insurance contract with a resident of this state by any individual or corporation who had not complied with these statutes. As said by Mr. Justice Winslow, in speaking for the court, in Rose v. Kimberly & Clark Co., 89 Wis. 550, 46 Am. St. Rep. 855, 62 N. W. 527, 27 L. R. A. 556: "The evil to be corrected is not the writing of a policy by an unlicensed company within this state alone, but the writing [284] of such a policy at all. Bearing in mind the object of the statute and the evil to be corrected, it is very plain that the object will be largely defeated, and the evil will flourish as before, if it be held that companies without license can establish their agencies just outside of the state line and conduct their business by mail."

Counsel for respondent seeks to distinguish the foregoing case from the case at bar, because the subject of insurance was property in Wisconsin, but no difference in principle is perceived. In each the contract attempted to be enforced is against the plain, positive prohibition of the statute. To hold otherwise would be to give foreign insurance companies a decided advantage over residents of this state and

practically nullify the statutes passed by the legislature for their protection.

It is well established that this state has the right to impose conditions upon foreign insurance companies doing business here when such conditions are not in conflict with the constitution or laws of the United States: Stanhilber v. Mutual M. Ins. Co., 76 Wis. 285, 45 N. W. 221; Chicago etc. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; State v. United States M. A. Assn., 67 Wis. 624, 31 N. W. 229; Aetna Ins. Co. v. Harvey, 11 Wis. 394. Nor does such legislation contravene the constitution of the United States: Stanhilber v. Mutual M. Ins. Co., 76 Wis. 285, 45 N. W. 221; Chicago etc. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Ashland L. Co. v. Detroit S. Co. 114 Wis. 66, 89 N. W. 904; Wyman v. Kimberly-Clark Co., 93 Wis. 554, 67 N. W. 932. The statute under consideration prohibits doing business of insurance or making contract of insurance with a resident of this state. The law denounces the making of any such contract with a resident of this state, and is very obviously against the enforcement of such a contract in our courts. The contract being contrary to the statutes and the policy of the law of this state, our courts will not lend their aid in the enforcement of it: Aetna Ins. Co. v. Harvey, 11 Wis. 394; Rose v. Kimberly & Clark Co., 89 Wis. 545, 46 Am. St. Rep. 855, [285] 62 N. W. 526, 27 L. R. A. 556. We are referred to Seamans v. Knapp-Stout & Co., 89 Wis. 171, 46 Am. St. Rep. 825, 61 N. W. 757, 27 L. R. A. 362, and Chicago etc. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940, as authorities for respondent's contention; but we cannot see that these cases sustain their position. On the contrary, they are clearly distinguishable from the case at bar. In Seamans v. Knapp-Stout & Co., 89 Wis. 171, 46 Am. St. Rep. 825, 61 N. W. 757, 27 L. R. A. 362, the insurance company and the defendant were residents of the state of Wisconsin, although the property insured was situated outside of the state. No law of the state of Wisconsin was violated either in the making of the contract or the enforcement of it. In Chicago etc. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940, the contract in suit was upon a lien or claim which accrued before the passage of the law which it was claimed was violated. It was held that the plaintiff was not transacting business in the state by passively continuing to hold a previously existing and valid lien or title, and that the commence-

ment and prosecution of the suit was not transacting business in the forbidden sense.

But it is strenuously contended that our courts should enforce the contract in question on the ground of comity. We are aware of no rule of comity which requires our courts to enforce the contract of a foreign corporation with a resident of this state in conflict with the letter and policy of our laws, whether the contract be made within or without the state: Rose v. Kimberly & Clark Co., 89 Wis. 545, 46 Am. St. Rep. 855, 62 N. W. 526, 27 L. R. A. 556; Stanhilber v. Mutual M. Ins. Co., 76 Wis. 285, 45 N. W. 221; Seamans v. Zimmerman, 91 Iowa, 363, 59 N. W. 290; Seamans v. Christian Bros. M. Co., 66 Minn. 205, 68 N. W. 1065; Seamans v. Temple Co., 105 Mich. 404, 55 Am. St. Rep. 457, 63 N. W. 408, 28 L. R. A. 430. The rule of comity claimed by respondent would place foreign corporations on more favorable ground in the transaction of insurance business with residents of this state than domestic corporations and foreign corporations duly licensed. The rule of comity does not go to this extent: 6 Thompson on Corporations, sec. 7885; 2 Morawetz on Private Corporations, 2d ed., sec. 965; Empire Mills v. Alston G. Co. (Tex. App.), 15 S. W. [286] 200, 505, 33 Am. & Eng. Corp. Cas. 15; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274. From what has been said it follows that the note sued upon was executed in contravention of the law of this state and should not be enforced by our courts.

By the COURT. The judgment of the court below is reversed, and the cause remanded with instructions to dismiss the complaint.

The Question as to What Law Governs when a policy of insurance is issued by an insurer domiciled in one state to an insured residing in another is discussed in the monographic notes to Grevenig v. Washington Life Ins. Co., 104 Am. St. Rep. 488-492; McGarry v. Nicklin, 55 Am. St. Rep. 51. For recent decisions on this question, see Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73; Fidelity Mut. etc. Assn. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813; Millard v. Brayton, 177 Mass. 533, 83 Am. St. Rep. 294; Expressmen's Mut. Ben. Assn. v. Hurlock, 91 Md. 585, 80 Am. St. Rep. 470.

Judicial Comity does not require the courts of one state to enforce, in contravention of its own law, policy, or morals, the laws of other states or contracts there made: See Palmer v. Palmer, 26 Utah, 31, 99 Am. St. Rep. 820, and cases cited in the cross-reference note thereto.

FRIEND v. YAHR.

[126 Wis. 291, 104 N. W. 997.]

INSTRUMENTS in Blank, Authority to Fill up.—A person having executed an instrument, leaving blank spaces therein to be filled, and delivered the same in such imperfect condition to another for use, the presumption is, nothing appearing to the contrary, that such person intended to confer upon such other authority to complete the instrument. The rule above stated applies to instruments required by law to be executed under seal and to be witnessed and acknowledged in order to entitle the same to be recorded, as well as to simple contracts.

INSTRUMENTS in Blank, Re-execution not Necessary.—In case of implied authority, in the circumstances stated in the foregoing propositions, being performed the instrument does not require re-execution or acknowledgment to give it full validity.

MORTGAGE, Satisfaction of Record not Necessary.—Payment of an indebtedness on a note secured by a mortgage on real estate extinguishes the mortgage lien without any satisfaction thereof of record or in writing.

MORTGAGE, Satisfaction of, by Whom may be Executed.—A mortgage having been extinguished by payment of the indebtedness, it is not necessary to valid record evidence thereof that a satisfaction piece shall be executed by the actual or apparent owner of such indebtedness for delivery to the mortgagor, or that there should be such delivery.

ASSIGNMENT OF MORTGAGE, Bona Fides of the Transaction.—If a person, acting for himself or another, for value acquires a promissory note before maturity, secured by a mortgage upon real estate, taking the title to such mortgage in the name of another by his consent, evinced by a general power of attorney, but without his knowledge as to the particular transaction, and thereafter such other by consent of such third person, evinced by such power of attorney, but without his knowledge as to the particular transaction, assigns his security in writing to a fourth person, the assignment being neither witnessed nor acknowledged, the bona fides of the transaction as to the latter or as to such first person is not affected by the mere use of the third person's name as assignee and subsequently as assignor, nor by the fact that he was not pecuniarily interested in the transaction, nor by the circumstance that the second instrument of assignment was not so executed as to be entitled to record. In the circumstances above stated the final holder of the legal title to the security can rely on the bona fides of the transaction between the vendor and the person dealing with him in the first transaction.

RECORD TITLE, Right to Rely Upon.—A person in dealing with another in respect to real estate may rely upon the record title to the property in the absence of actual knowledge of the title in fact, or of facts sufficient to put him on inquiry in respect thereto.

MORTGAGE, Record of Satisfaction of, Right to Rely on.—A person in taking a mortgage on real estate may rely on the record of a satisfaction by the record owner of a prior mortgage on the same property, in the absence of knowledge, actual or constructive, of the ownership of such prior mortgage by some other person than such owner.

MORTGAGE, Record of, of What Gives Notice.—The record of a mortgage affords constructive notice only of its existence and ownership thereof by the mortgagee named therein, not of the assignment of such mortgage to another.

PAYMENT OF MORTGAGE to Agent, Otherwise Than in Money.—A person in possession of a note belonging to another, secured by a mortgage upon real estate, with authority to collect the same, cannot rightfully accept in payment anything but money. Nevertheless, if such person takes from the mortgagor a new mortgage on the real estate covered by the first mortgage for the purpose of providing means with which to pay off the latter, and thereafter by the use of such second mortgage he acquires such means before his agency to collect is terminated, such authority is thereby executed and the first mortgage indebtedness and lien extinguished.

MORTGAGE, Agency to Collect and Presumption of Its Continuance.—If a person intrusted with authority to collect a mortgage indebtedness enters upon the execution of such authority and continues efforts in that regard until he obtains the necessary money therefor, nothing appearing to the contrary, the agency to collect and possession of the securities by the agent is to be presumed to continue correspondingly, and the legal effect of obtaining the money is the extinguishment of the note and mortgage, regardless of whether such money in due course, or otherwise, reaches the rightful owner.

Action to foreclose a mortgage, but what mortgage we are unable to state. Probably it was the mortgage for sixteen hundred dollars, made November 14, 1902. There is nothing in the statement to show in whose favor that mortgage was given, nor how Herman transferred it to Friend. We are also unable to state whether Henry Herman, named in the opinion and in the statement of facts, acted as agent for Lawrie under any written authority, and if so, what were its terms. Being ourselves unable to understand fully the facts involved, and fearing, for want of that understanding, we might be unable to correctly prepare either the syllabi or the statement of facts, we have departed from our usual custom and have adopted, as shown above, the syllabi prepared by Judge Marshall and also his statement of facts, which is as follows: "Action to foreclose a mortgage. The complaint was in the usual form. Defendants Thomas H. Bowes and Mary Kurtz, as executors of the last will of James Lawrie, deceased, pleaded ownership of a note for sixteen hundred dollars, secured by a mortgage on the premises described in the complaint, given to their testator in his lifetime by defendants Francis Ward and Alice Ward, the makers of plaintiff's mortgage, and that the said mortgage was paramount to that of the plaintiff. They ask for appropriate relief. Defendants Francis Ward and his wife Alice Ward pleaded extinguish-

ment of the Lawrie mortgage by payment of the indebtedness secured thereby to Henry Herman, as agent for Lawrie in his lifetime. Defendant Yahr pleaded ownership of a six hundred dollar note made by said Francis Ward, secured by a mortgage on the premises described in the complaint, executed by said Francis Ward and his wife, and that the same was paramount to the Lawrie mortgage. The facts established by the evidence as found by the trial court, so far as necessary to be stated, are these:

"On December 12, 1893, defendants Francis Ward and Alice Ward mortgaged the real estate described in the complaint to Henry Herman to secure payment in five years of Francis Ward's note for sixteen hundred dollars and interest thereon at the rate of seven per cent per annum, payable semi-annually. The mortgage was duly recorded December 16, 1893. January 10, 1894, Herman, for value, in writing assigned the mortgage and indebtedness secured thereby to James Lawrie. The assignment was not recorded till April 23, 1903. The failure in that regard was in accordance with a then existing custom. Interest on said note was duly paid to Lawrie or his agent until 1898. In October, 1902, Lawrie delivered the mortgage, note and assignment to Henry Herman with instructions to collect. Herman delivered the same to an attorney with instructions to commence foreclosure proceedings but not to file any papers. The attorney did as directed, Lawrie verifying the complaint, and service thereof being duly made in the action. No papers in such action were filed. No bill for legal services was rendered to Lawrie, nor was the latter notified of the termination of the action, which thereafter occurred.

"On November 14, 1902, by previous arrangement, Alice Ward, Ferdinand T. Yahr and Henry Herman met at the latter's office. Neither Lawrie nor his attorney knew of such meeting. The amount due on the mortgage indebtedness for interest and unpaid taxes was then determined. An outstanding mortgage for three hundred dollars on the premises in question to a corporation represented by Yahr was satisfied, a new note for sixteen hundred dollars, payable in five years with interest at five per cent per annum, was prepared and a mortgage on such premises to secure the same was signed by Alice Ward. Later in the day the mortgage and note were signed by Francis Ward, and the mortgage was duly witnessed and acknowledged so as to be entitled to record. At

this time the Wards were assured that a release of the Lawrie mortgage was ready for delivery and would be recorded with the new mortgage. No release was in fact ready for delivery. The mortgage was duly recorded the next day after its execution. At the time of making the second sixteen hundred dollar mortgage the Wards gave a note for six hundred dollars, due in five years thereafter with five per cent interest per annum, to defendant Yahr, and mortgaged the premises in question to secure payment thereof, the same to be subject to the sixteen hundred dollar mortgage. The consideration for the Yahr mortgage was the satisfaction of the three hundred dollar mortgage and a loan of three hundred dollars. At the same time the Wards further mortgaged the premises to Herman to secure payment of Francis Ward's note for six hundred dollars given to Herman, which by its terms drew interest at the rate of five per cent per annum and was payable in five years. Thereafter such note and mortgage were duly assigned to defendant Vedder, who is now the owner thereof. That note was due at the time of the commencement of this action. By agreement with defendant Yahr his mortgage was made subject to the Vedder mortgage.

"At the time of the transactions of November 14, 1902, Yahr had actual notice that Lawrie was the assignee of Herman of the first sixteen hundred dollar mortgage, and Vedder had constructive notice of such fact. Herman, from the time he transferred the mortgage to Lawrie till he left the country in 1903, knew that the mortgage indebtedness had not been paid and that Lawrie had never released his mortgage. As a result of negotiations between Herman and Charles Friend, plaintiff's son and attorney, between the date of the second sixteen hundred dollar mortgage and the twenty-fourth day of November thereafter, the former transferred such mortgage and the indebtedness secured thereby, delivering the papers to said Friend. In consummating the deal Herman delivered with the note and mortgage an assignment executed so as to entitle the same to be recorded, except the name of the assignee was left blank, a satisfaction, in form, of the Lawrie mortgage executed by Herman without the knowledge of or consent of Lawrie, and an abstract of title showing the first sixteen hundred dollar mortgage to be unsatisfied of record. In January, 1903, Friend completed the assignment by writing in the name

of A. G. Stein, of New York, as assignee. Neither Stein, Herman nor Lawrie knew of this. Friend acted for Stein under a duly recorded power of attorney authorizing him to do such business. Before the commencement of this action Friend, under such power, assigned the securities acquired by him as aforesaid to the plaintiff, though the assignment was not executed so as to be entitled to record, and the same has never been recorded. Stein did not furnish any money to carry out the transaction aforesaid or know of the same. When Friend acquired the mortgage from Herman he had notice of the state of the record as to the Lawrie mortgage. He made no inquiry therefor, nor was the mortgage or the note secured thereby produced at the time of the transaction, nor was there any evidence produced on the trial that such securities were then in Herman's possession. Herman did not execute said satisfaction with the intention of delivering the same to the mortgagors. It was not received by Friend with the understanding that it was to be so delivered. He retained the same until April 10, 1903, when he caused it, together with the assignment, to be duly recorded.

"Shortly thereafter Herman absconded. Friend knew, prior to such departure, of Herman's intentions in the matter. At the time of the transaction between Friend and Herman in respect to the mortgage, the latter delivered to the former three thousand dollars face value of corporate stock to secure payment of eighteen hundred dollars, he at the same time giving Herman his check for that amount, which was subsequently paid. The stock was later returned to Herman. Plaintiff knew nothing of this transaction. For some fifteen years prior to Herman's departure he was an active business man in Milwaukee, where all the transactions referred to occurred. During such period he was engaged in many business matters and enterprises, in some of which Friend was associated with him, and their relations were very close and friendly. On the eve of Herman's departure he transferred to Friend some property in settlement of various claims the latter had against him. The Lawrie note and mortgage were returned to Lawrie some time after the execution of the second sixteen hundred dollar mortgage. Other facts were found sufficient to support the judgment, if correct conclusions of law were drawn by the trial court.

"The court held thus: The Lawrie mortgage is in full force and the first lien upon the premises described in the complaint.

The second sixteen hundred dollar mortgage and note were taken by Herman, and the money obtained therefor from Friend, with the intention on the former's part of converting the same to his own use. The assignment of such mortgage was too incomplete when delivered to be effective for any purpose, and it was not made effective thereafter, in that it was not rewitnessed and acknowledged after its completion by filling in the name of an assignee. Friend took the mortgage with constructive notice of Lawrie's rights under the first mortgage, and not as a bona fide holder. The satisfaction, in form, of Lawrie's mortgage was ineffective for want of delivery thereof to the mortgagors. Herman was not the agent for Lawrie in taking and disposing of the second sixteen hundred dollar mortgage. The several mortgages mentioned, as regards priorities, rank as follows: The Lawrie mortgage first, the Vedder mortgage second, the Yahr mortgage third, and the plaintiff's mortgage fourth.

"Judgment was entered accordingly, from which plaintiff and Yahr separately appealed."

Turner, Hunter, Pease & Turner, Charles Friend and Arthur S. Friend, for the appellants.

G. W. Hazelton, for the respondents.

298 MARSHALL, J. The finding that appellant is not the bona fide holder of the sixteen hundred dollar mortgage of November 14, 1902, is grounded, in the main, on the following supposed infirmities in her position: 1. The transfer of the mortgage was ineffective because the assignment was incomplete when delivered, in that the space for the name of the assignee was blank, and it was not reacknowledged after being completed. 2. Charles Friend had constructive notice of the first sixteen hundred dollar mortgage, referred to as the Lawrie mortgage, when he took and paid for the one in question, and did not make any inquiry as regards whether Herman, the owner of record, had parted therewith or require production of papers showing that he was such owner in fact, or indicating that he had authority to make the satisfaction thereof. 3. The satisfaction, in form, of such first mortgage delivered to Friend by Herman was invalid, because the latter neither had authority to make it nor was it made to be delivered by him to the mortgagors, nor given to Charles Friend to be so delivered. 4. The assignment was completed, in

form, by writing in the name of Stein without his knowledge or his having furnished any funds with which to purchase the securities. 5. The note and mortgage were by Charles Friend, acting under a power of attorney from Stein but without the latter's knowledge, assigned in writing to the plaintiff, the writing not being witnessed or acknowledged. We will consider such supposed infirmities in their order.

1. This court has so repeatedly held that one who holds a paper executed by another, as in this case, with express or implied authority to fill up the blanks therein, may do so, and then record the instrument if that is necessary, with the same effect as though the paper had been fully made before delivery, that we hardly need do more than refer to a few of the instances: Vliet v. Camp, 13 Wis. 198; Van Etta v. Evenson, [299] 28 Wis. 33, 9 Am. Rep 486; Schintz v. McManamy, 33 Wis. 299; Johnston H. Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; Nelson v. McDonald, 80 Wis. 605, 27 Am. St. Rep. 71, 50 N. W. 893.

Numerous decisions, most of them being quite ancient, may be found holding to the contrary of the foregoing. Those, however, of this court in respect to the matter are in harmony with the now prevailing rule. Dixon, C. J., in Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486, said, as to the supports of conflicting decisions: "They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away." The rule deducible from that decision is clearly indicated in the syllabus in these words: "Where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure (from whomsoever he could) a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and when so filled the instruments were valid without a new execution and delivery."

It will be found decided in some cases holding that blank spaces, such as the one in question, may be filled up after delivery of the paper by authority in writing, that parol authority is insufficient, and that if it were otherwise authority could not be implied from the mere delivery of the paper in its incomplete condition; but the general rule is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to, in form, give it full valid-

ity upon the filling up of blanks, authority for the holder thereof to do that is implied.

2. True, Friend had constructive notice of the first mortgage, but he had no notice, constructive or otherwise, of its assignment to Lawrie. The idea that one is not protected in dealing with the record owner of a mortgage, as regards a satisfaction thereof, unless the latter produces the securities, showing affirmatively that he is the right one to enter such [300] satisfaction of record, is not in harmony with the recording act nor with the adjudications on the subject. There is nothing which we can discover charging Friend with knowledge of a state of things sufficient to put him on inquiry as to whether Herman was in fact the owner of the first mortgage. He had a right to assume that if Herman had assigned the mortgage that fact would appear of record. No such fact so appearing and no circumstances coming to his knowledge indicating the true state of things, or suggesting the probability of such state being inconsistent with the record, when Herman delivered the satisfaction to him he was warranted in supposing, as he did, that the note had been paid and with the mortgage delivered to the mortgagor.

The law as above indicated is supported by the following authorities: Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614; Bank of the State of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Vannice v. Bergen, 16 Iowa, 555; Livermore v. Maxwell, 87 Iowa, 705, 55 N. W. 37; Ahern v. Freeman, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677; Ogle v. Turpin, 102 Ill. 148. In Girardin v. Lampe, 58 Wis. 267, 16 N. W. 614, the facts were these: The assignee of the mortgage took a defectively written transfer thereof and recorded it. Subsequently the assignor discharged the mortgage. Later a third person for value acquired an interest in the mortgaged property without notice of the assignment, other than such as was afforded by the defective record. That was not effective because the instrument of assignment was not so executed as to entitle it to be recorded. It was held that the third person's interest in the property was paramount to the mortgage. The gist of the decision in Ogle v. Turpin, 102 Ill. 148, and the facts involved are stated concisely in the syllabus in these words: "An assignee of notes secured by a mortgage may protect his equitable lien upon the mortgaged premises, by taking and putting upon record the assignment of the mortgage, so as to give notice of his interest, and thereby prevent others from

[301] being deceived by any subsequent satisfaction entered of record by the mortgagee."

"A person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record, as showing title in his mortgagor."

The other cases cited are quite as decisive on the point under discussion. The purpose of the record is too obvious, and the law in respect to the matter, as indicated, too plain, to require any very extended discussion of the matter. When one deals with another respecting real estate, in the absence of actual notice of the true state of the title or of facts sufficient to put him on inquiry in respect thereto, he may safely rely on the record. If that works hardship to a third person, as in a case like this, it is chargeable to the latter's negligence in not exercising ordinary care to guard his own interest by causing the record to show the actual state of the case. The rule applies that, as between two innocent persons, one of whom must suffer pecuniary loss, the one is to be preferred who is without fault.

3. The point that Herman did not have authority to make the satisfaction has been sufficiently answered. He had apparent authority and that was sufficient. The record, which persons circumstanced as Friend was had a legal right to rely upon, indicated the existence of such authority. Delivery of the satisfaction piece to the mortgagor, or preparation of it for that purpose, was not essential to its validity. The only purpose of such an instrument is to create record evidence of that which is accomplished by mere payment of the indebtedness. Since Ward and Lawrie were responsible for the state of the record, indicating that Herman was the proper person to make the instrument of satisfaction, as to innocent third persons it was competent for him to do so. This is unlike a case where the person appearing of record to be authorized to satisfy a mortgage deposits a satisfaction piece with a third person for delivery to the mortgagor upon condition, and he [302] makes delivery regardless thereof. In such circumstances the instrument is held to be void, because the person purporting to be bound never in fact acted in the matter: Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993.

4. The fact that Stein's name was added to the satisfaction piece as that of the assignor without his knowledge, and that he did not furnish the funds given in exchange for the se-

curities, has no significance in view of the power of attorney. It is undisputed that the title to the property was placed in Stein's name for convenience and by his permission.

5. The circumstance that Stein did not know of the assignment of the securities, in form, to Mrs. Friend is of no significance in view of the power of attorney. The circumstance that Mrs. Friend did not know of the acquirement of the securities when it occurred is not important, since the evidence shows that her son Charles had ample authority to act for her in such matters and parted with full value in her money, or his own, in exchange for the property. Whether in the transaction the money was regarded by the parties as a loan, as the court in effect found, is immaterial, since the evidence is undisputed that the same was not repaid and was finally treated as purchase money. Whether it was the one or the other does not affect the bona fides of the transaction. The circumstance that the assignment to Mrs. Friend was not witnessed or acknowledged is likewise of no significance. Neither was essential to transfer title. The bona fides of her ownership rests on the transaction between Charles Friend and Herman.

The findings to the effect that Herman absconded soon after the transaction with Charles Friend; that the latter knew of the former's secret intentions in that regard; that the relations between the two for years prior had been very close and friendly, do not seem to require any extended notice. Counsel laid considerable stress on these circumstances upon the oral argument, as if they should be regarded as of some weight as to whether Friend knew, or ought to have known, when he 303 obtained the mortgage that Herman had no right to satisfy the Lawrie mortgage. However, it does not seem that the conclusions of law were grounded on such circumstances. At best they are sufficient to create mere suspicion. They do not warrant the belief that Friend colluded with Herman in the fraudulent transaction as to the Wards and Lawrie, or that he had knowledge, or ought to have had, at the time he acquired the note and mortgage that Herman was acting corruptly in the matter. Knowledge only came to him, as appears, of Herman's secret intentions to leave the country months after he obtained the securities. He certainly had a right to suppose, as the fact was, that the second sixteen hundred dollar mortgage was given to provide means to take up the first one. He testified that he so understood the matter when he took the mortgage, and that he then had no knowl-

edge of Herman's being financially embarrassed. There is no satisfactory evidence to impeach that.

It is contended on behalf of both appellants that the evidence clearly shows that the Lawrie mortgage was discharged in fact by the indebtedness to which it was incident being collected by Herman as Lawrie's agent, and that the findings in respect to that branch of the case are clearly wrong

It must be conceded that if, while the securities were in Herman's possession for the purpose of collecting the indebtedness, he executed such purpose the money obtained belonged to Lawrie, and the mortgage lien was extinguished regardless of any formal entry to that effect upon the record. The trial court found that there was no claim on the trial that the Lawrie papers were in Herman's hands November 24, 1902, when the transaction with Friend occurred, and no evidence that he then had such possession. That was excepted to as were other findings touching the question of payment. It seems that the attitude of counsel for appellants on this branch of the case and the effect of the evidence must have been misunderstood. Counsel must have claimed from the first to last that [304] Herman was the agent of Lawrie to collect the latter's claim, during all the transactions in relation thereto. It was important to show that he was armed with the proper evidence of such authority, not only when the mortgages were made November 14, 1902, but when the transaction occurred with Friend. No one claimed at the trial, we assume, certainly no one does upon appeal, that authority to collect of Ward authorized acceptance in payment of anything but money. It was obviously and properly claimed that if he trusted Herman to provide means out of the new mortgages made November 14, 1902, to pay Lawrie, and the latter did so before his authority was terminated, extinguishment of the Lawrie mortgage was the legal effect thereof.

Now the court found that Herman had the Lowrie papers a short time prior to November 14, 1902, with authority to collect of Ward. While such authority did not by implication include authority to accept in payment anything but money, it included authority to exercise reasonable discretion as to the means to be used to accomplish the purpose of the agency, such as the employment of an attorney to foreclose the mortgage. When did the agency terminate? The findings do not cover that directly. They, in effect, hold that it ended when the papers were placed in Comstock's hand. We infer that

because of silence as to whether Comstock returned the papers to Herman prior to the occurrences of November 14, 1902, leaving it to be assumed that he did not, and because of the finding that he did not participate in such occurrences. The views thus taken of the evidence by the trial court, which seem to be clearly unwarranted, resulted in the making of the finding as to there being no evidence that Herman had the Lawrie papers at the time of the transaction with Friend November 24, 1902. It appears to be clearly established by the proofs that Comstock returned the papers to Herman on or prior to November 14, 1902; that he had them at that time; that Comstock had notice of the meeting on that date at Herman's office 305 and participated therein; and that such papers did not leave Herman's possession till after November 24th thereafter.

The evidence, as we read it, is to the effect that the amount necessary to discharge the indebtedness to Lawrie and other claims upon Ward's property existing November 14, 1902, and the costs of the foreclosure was determined by Comstock and a statement thereof made by him in writing at the request of Mrs. Ward and Mr. Yahr, and that the three then went to Herman's office to settle the matter. This is Yahr's testimony on the subject: "We met up in Comstock's office and he then had the final figures showing how much money it would take to settle these whole amounts, that is, the amount due on the Lawrie mortgage, and on my mortgage, and on the unpaid taxes and interest. By my mortgage I mean the $300 mortgage held by the Baumbach Company. Then we all went down to Mr. Herman's office, Mr. Comstock, Mrs. Ward and I. Mr. Herman was waiting there for us. The Lawrie note and mortgage were in his office at that time. That was on the fourteenth day of November, 1902, the day the papers were executed. Mr. Herman had the note and mortgage there."

The witness testified further, in effect, that at such meeting he discharged his mortgage and advanced three hundred dollars in money, taking a new mortgage for six hundred dollars; that he insisted upon seeing the satisfaction of the Lawrie mortgage before doing so; that Herman exhibited the same to him, and that Comstock remained with Herman and Mrs. Ward till after he concluded his part of the business and went away. Mrs. Ward testified to the same effect. Comstock testified that nothing positively was concluded as to the settlement of the Lawrie indebtedness in his office, or at any office when he was present. He did not testify that he had

no notice of the meeting at Herman's office on November 14, 1902. The trial court seems to have accepted the witness' general conclusion as warranting the finding that he had no such notice, though Mrs. Ward and Mr. Yahr testified to the contrary, and his evidence is contradictory [306] and very unsatisfactory. He testified that Mrs. Ward and Mr. Yahr called on him at his office in relation to the settlement of the Lawrie indebtedness, and that a conversation was then had resulting in an agreement in respect to the matter. He said nothing at first as to Herman being present, or in respect to the Lawrie papers. Later he said: "Mr. Herman had possession of the Lawrie note and mortgage at that time." (Referring to the time of the conversation in his office.) "I had two interviews. The conversation I am speaking of was in my office, and I had also previous to that time met with them in Mr. Herman's office. After this conversation I had nothing more to do with the matter one way or the other. At the time of the last interview Mrs. Ward, Mr. Herman, and Mr. Yahr were present. That was previous to the interview to which I testified." (Again referring to the conversation in his office.) "At that time Mr. Herman had the mortgage and note there."

Thus it will be seen the witness said that Herman was present at the time of the conversation in the former's office when the agreement was made (obviously the same agreement testified to by Mrs. Ward and Mr. Yahr, which was concluded in Mr. Herman's office), and that Herman then had possession of the Lawrie papers. He spoke of that as the last he had to do with the matter, and of the last interview (the one when Mrs. Ward, Mr. Yahr, and Mr. Herman were present) as having occurred previous to the interview in his office, which he declared was the last interview. How one of two interviews could be the last, and yet have occurred previous to the other, would be difficult to explain. The witness was evidently confused in respect to the matter. Probably there were two interviews. Mrs. Ward and Mr. Yahr testified that there were; that one occurred in Comstock's office some days prior to November 14, 1902, and that the other occurred on such date partly in Comstock's office and partly in Herman's office. Comstock could not reasonably be expected to remember the transaction as clearly as Mrs. Ward and Mr. Yahr. [307] His office was but a few steps from Herman's, both being in the same building. A circumstance of going from one to the other was probably not of much significance to him. The

transaction involved was an ordinary one in a lawyer's professional career, while to Mrs. Ward and Mr. Yahr, particularly the former, it was an unusual matter. On the main point all the witnesses agree, in this: When the negotiations took place for a settlement of the Lawrie indebtedness and the giving of a new mortgage to accomplish it, Herman was in possession of the Lawrie papers.

So the true state of the case appears to be this: On the fourteenth day of November, 1902, Herman then having the Lawrie papers and authority to accept payment of the indebtedness, Ward intrusted him with three mortgages on his property for the purpose, in the main, of raising the necessary money to make such payment. Three hundred dollars was at that time obtained from Yahr. Subsequently, by the transaction with Charles Friend, the balance of the money for such payment was obtained. Yahr and Ward acted in the matter on the faith of Herman's having possession of the Lawrie papers and authority, as record owner of the mortgage, to discharge it. There is no evidence that Herman parted with the Lawrie papers after November 14, 1902, and before the occurrence of November 24th, thereafter, or as to when Lawrie regained such possession. The reasonable inferences all indicate that Herman had them till some time subsequent to the transaction with Friend. Such is the legal inference. One of the most familiar rules of evidence is that "when the existence of a personal relation is once established by proof, the law presumes that the relation continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question": 1 Greenleaf on Evidence, 15th ed., sec. 41; Body v. Jewson, 33 Wis. 402; Eames v. Eames, 41 N. H. 177.

308 We cannot escape the conclusion that the finding of the trial court that there is no proof that Herman was in possession of the Lawrie note and mortgage November 24, 1902, and the finding, in effect, that he was not then the agent of Lawrie to collect of Ward, is contrary to the clear import of the evidence. During the continuance of Herman's agency for Lawrie to collect of Ward, and his agency for the latter to use the mortgages executed November 14, 1902, for the purpose of securing money to pay such indebtedness, he performed in both these respects. Thereby the Lawrie mortgage was extinguished, leaving its equivalent in Herman's hands

for Lawrie. Herman's failure to pay the money to his principal is a misfortune which the latter's representatives cannot rightfully shift to the holders of the other mortgages. Herman embezzled Lawrie's money, not Ward's.

By the COURT. The judgment is reversed on both appeals, and the cause remanded with directions to render judgment in accordance with this opinion.

Where One has Intrusted an Instrument Containing Blanks to another with the intent to become bound thereon, he will be liable on the instrument, though the blanks are filled. He is deemed to have given an implied authority to the holder to fill the blanks with the proper terms: See the monographic note to Burgess v. Blake, 86 Am. St. Rep. 107.

The Payment of the Debt Secured by a Mortgage discharges the lien and extinguishes the mortgage (Bogert v. Bliss, 148 N. Y. 194, 51 Am. St. Rep. 684; Schilling v. Darmody, 102 Tenn. 439, 73 Am. St. Rep. 892), without an entry of record of satisfaction: German American Ins. Co. v. Humphrey, 62 Ark. 349, 54 Am. St. Rep. 297; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 6 Am. St. Rep. 144; Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184. Where the record shows that a prior mortgage has been satisfied, without showing by whom payment was made, a purchaser having no further notice than the record may assume that payment was made by the person owing the primary duty to make it: Ahern v. Freeman, 46 Minn. 156, 24 Am. St. Rep. 206.

DAVIS v. SCHMIDT.

[126 Wis. 461, 106 N. W. 119.]

RES JUDICATA.—The Recovery of Judgment for One Year's Interest on a Note is not necessarily conclusive of the right to recover a balance alleged to be due thereon, in the absence of any allegation that the matters involved in the second action were litigated or determined in the first. (p. 940.)

SALE, Election to Affirm, What Amounts to.—A suit to recover damages for a breach of warranty in a sale is an irrevocable election to affirm the sale. (p. 941.)

REMEDIES, Election of.—If the purchasers of a horse, who have given a note for part of the purchase price, commence an action against their vendors to recover damages for a breach of warranty in the sale of the horse, without returning or offering to return it, this is an irrevocable election of remedies precluding them from afterward defending an action on such note on the ground that there was no sale, or that the sale had been rescinded. (p. 942.)

REMEDIES, Election of, Doctrine of is Applicable Against a Defendant.—The defendant may be precluded from maintaining

a defense pleaded by him on the ground that by an election of remedies made by him in commencing a prior action against the plaintiff, the defendant had deprived himself of such defense. (p. 943.)

REMEDIES, Election of not Avoided by Amending the Complaint.—If plaintiff, by commencing an action and filing his complaint, has elected his remedy, he cannot avoid the effect of the election by the consequent amendment of his complaint. (p. 943.)

A JUDGMENT Against One of the Makers of a Joint and Several Note for Interest Then Due Thereon does not bar a subsequent action against all the makers for the balance of an installment of principal thereof. (p. 944.)

RES JUDICATA—Pleading.—A Former Adjudication is Admissible in Evidence Without Pleading It. (p. 944.)

RES JUDICATA.—A Judgment in Favor of the Plaintiff for Interest on a Promissory Note is conclusive in a subsequent action for the balance of the principal thereof, if the matters in issue in the second action were actually litigated and determined in the first. (pp. 944, 945.)

Action upon a joint and several promissory note dated May 23, 1903, and payable to Mose Goldberg or bearer. The defendants included the makers and also W. C. Zachow, indorser of the note. In addition to alleging the terms and execution of the note and its protest, the complaint also averred that the plaintiff had recovered judgment for one year's interest against the defendants upon the whole amount of the note. The indorser Zachow did not answer. The other defendants denied generally the allegations of the complaint, alleged that the indorsements on the note were falsely and fraudulently made, admitted that a judgment was recovered for one year's interest, but averred that an appeal had been taken from such judgment to the circuit court. The defendants further pleaded that the signatures to the note were procured by its payee by fraud, deceit and fraudulent representation as to the character of the paper.

At the close of the testimony, the plaintiff moved that the jury be directed to return a verdict in his favor, but the motion was denied. The jury thereafter returned a verdict against the defendant Zachow, but in favor of all the other defendants. Judgment was rendered upon the verdict, and the plaintiff appealed.

Wallrich, Dillett & Larson, for the appellant.

Drier & Winter, for the respondents.

462 KERWIN, J. 1. Error is assigned in denying plaintiff's motion that a verdict be directed in his favor. It is con-

tended [463] by appellant that, because the answer admits that judgment was recovered for one year's interest against defendants, the determination of the court in such action for the recovery of interest is conclusive between the parties and their privies, and that the defendants cannot now question the plaintiff's right to recover on the note in suit. The answer denies generally the plaintiff's right to recover, and the admission in the answer that judgment was recovered for one year's interest upon the note in suit is not sufficient to conclude the defendants in a suit on a different cause of action, where it is not alleged that the same matters were litigated or determined in the suit for interest. There is nothing in the allegation of the complaint, nor the admission in the answer respecting the recovery of judgment, which shows that the judgment was recovered upon the merits, or that the defense interposed in such action for the recovery of interest was the same as the defense in this action. The mere allegation of the recovery of interest in the complaint and the admission thereof in the answer is not sufficient to conclude the defendants in this action. It does not appear from the pleadings that the defense set up here was litigated or determined in the former action. Hence the judgment in the former action upon a different cause of action is not binding here: Wentworth v. Racine Co., 99 Wis. 26, 74 N. W. 551; Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195; 1 Van Fleet on Former Adjudication, sec. 30.

It is further claimed that defendants, with full knowledge of the facts and having more than one remedy, elected their remedy by commencing suit against L. M. Goldberg Company, which remedy is inconsistent with the defense now set up, and therefore they cannot maintain their present defense to this action. It appears from the record that the note in suit was given for the purchase price of a stallion, which was delivered about the time of the execution of the note. About six months afterward the makers of the note commenced an action against L. M. Goldberg Company—a copartnership composed of L. M. Goldberg, C. A. Finisterwald and Mose [464] Goldberg, payee in said note—to recover damages for breach of warranty in the sale of the horse for which the note was given. In short, it was claimed that the defendants here were induced to purchase the stallion relying upon the warranties and representations of the payee, which were false, and that the horse was falsely represented to be worth two thousand six hundred dollars, when in fact it was worth not to ex-

ceed fifty dollars, and that the purchase price—two thousand six hundred dollars—was paid in the shape of the promissory note in suit, the signatures to which were obtained by fraud, in consequence of which plaintiffs (defendants here) sustained damages in the sum of two thousand six hundred dollars, for which they demanded judgment. The record does not disclose that the defendants ever returned or offered to return the stallion, or ever rescinded the contract of purchase, and the action commenced by them for the recovery of damages clearly evinced their intention to stand upon the suit for damages for breach of the contract, and not upon rescission. They could only recover in the action for damages upon the theory that they were liable upon the note, and clearly this was the basis of their damages. Had they recovered in the suit commenced for damages, it is very clear they would be liable upon the note. They could not have their damages, which, in effect, were based upon the consideration of the note, and also escape the payment of it. The two remedies would be clearly inconsistent, and the defendants here, having elected their remedy by suing for damages, elected to affirm the sale: Rowell v. Smith, 123 Wis. 510, 102 N. W. 1; Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363, and cases cited in opinion; Moller v. Tuska, 87 N. Y. 166; Rodermund v. Clark, 46 N. Y. 354. As said in Rodermund v. Clark, 46 N. Y. 354, 357: "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

Here, upon the facts appearing in the record, the action of the defendants in commencing suit for breach of warranty was consistent with no other theory than an affirmance of the sale, [465] the consideration of which was the two thousand six hundred dollar note. Therefore, we see no escape from the conclusion that in the commencement of such action with knowledge of the facts, or at least reasonable means of knowledge, the defendants here elected their remedy and are bound by such election.

It is claimed by counsel for respondent that the doctrine of election of remedies does not apply to a defendant, and that a defendant may set up and maintain in the same answer as many defenses as he may have, whether they be consistent or not; and he cites South Milwaukee B. H. Co. v. Harte, 95 Wis. 592, 70 N. W. 821; Kerslake v. McInnis, 113 Wis. 659,

89 N. W. 895; Gates v. Avery, 112 Wis. 271, 87 N. W. 1091. In South Milwaukee B. H. Co. v. Harte, 95 Wis. 592, 70 N. W. 821, it appears that the defenses were not inconsistent in their facts. They were set up in the answer and submitted to the court for its determination, and in referring to the doctrine that defenses must be consistent the court said (95 Wis. 595, 70 N. W. 822): "This rule does not invade the general principle that the truth should be pleaded, nor the principle that an admission in an answer will not be affected by a repugnant denial in another part of the same answer. While authorities may be found stating, in general terms, that inconsistent defenses cannot be set up in the same answer, examination will show that these are generally cases where repugnant allegations of fact are contained in the different defenses, and where, consequently, the proof of one defense would necessarily disprove the other."

In Gates v. Avery, 112 Wis. 271, 87 N. W. 1091, the defenses claimed to be inconsistent were a general denial and payment in full, and it was held that the two defenses were not inconsistent. A general denial and plea of payment were clearly not inconsistent defenses. In Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895, it was claimed that inconsistent defenses were included in the plaintiff's reply; but it is said that there was, however, but one defense relied upon and submitted to the jury, and that no objection was [466] made to the form of the pleading on the trial. It does not appear in any of these cases that a deliberate election was made before suit brought, and hence we do not regard the cases in point. While considerable latitude is allowed in setting up defenses where they are not inconsistent in their facts, although possibly they may be in legal theory, the cases are quite different from the one before us, where the contract was deliberately affirmed and the election made to seek the remedy for damages on the theory that a contract existed and that there had been a breach of it: Bostwick v. Mutual L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

It is said by counsel that defendants, under the statute, had a right to avail themselves of any defenses, whether inconsistent or not; but the facts show that their alleged defense to the note was not a defense at all, since they had affirmed the contract, failed to return the horse, and elected to stand upon their right to recover damages before action brought. This absolutely deprives them of the defense upon the note which

in the case before us they sought to make: Bostwick v. Mutual L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

Some eight months after the complaint in the suit against Goldberg company was sworn to, plaintiffs sought to amend the same by setting up that four hundred dollars had been paid on the note before the plaintiffs in that action had knowledge of the fraud, and claimed one thousand dollars special damages for loss of profits because the horse was not as represented and twelve hundred dollars for costs and expenses imposed upon them in defending lawsuits through the alleged fraud and deceit. But it will be seen that this amendment did not materially change the original complaint. It was still a complaint for damages on the contract, and, even if it did change the cause of action to a different one from that set up in the original complaint, it would not avail the defendants, since they elected their remedy when they affirmed the contract and commenced their action for damages. It appears from their original complaint, as well as from the record [467] in this action, that they had knowledge, or at least reasonable means of knowledge, of the alleged fraud at the time such complaint was made, and were then bound to elect whether they would stand upon the contract or repudiate it: Rowell v. Smith, 123 Wis. 510, 102 N. W. 1.

Counsel for respondent also invokes the doctrine that where there is but one remedy there can be no election, citing Fuller-Warren Co. v. Harter, 110 Wis. 80, 84 Am. St. Rep. 867, 85 N. W. 698, 53 L. R. A. 603 It will be seen, however, that the doctrine of this and other cases to the effect that where one supposes he has a certain remedy and pursues it, when such supposed remedy does not in fact exist, he is not precluded from pursuing the remedy which he in fact has, does not apply. The respondent does not come within this rule, for the reason that in the instant case he had two remedies which were inconsistent, therefore the choice of one forever precluded him from pursuing the other. The distinction is clearly pointed out in the late case of Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, as well as in Fuller-Warren Co. v. Harter, 110 Wis. 80, 84 Am. St. Rep. 867, 85 N. W. 698, 53 L. R. A. 603, and further discussions would seem unnecessary.

2. Error is assigned because the court rejected evidence offered by the plaintiff of the judgment rendered in justice's court against defendant Herman Yakel for the first year's in-

terest due upon the note in suit. The offer of evidence was to the effect that the suit had been commenced and that Yakel appeared therein by his attorneys, and that the defenses interposed and issues in the action were the same as the defenses and issues interposed by the defendant Herman Yakel in this action. This evidence was objected to and ruled out. It is claimed by counsel for respondents (1) that the action against Yakel, he being a joint maker on the note with the other defendants, was a bar to the present action against all defendants; (2) that the evidence was not admissible, because the facts were not pleaded by the plaintiff. The note in question was joint and several. The suit commenced against Yakel for interest was upon a separate and independent cause of action. [468] The instant suit for balance due upon an installment was also upon a separate cause of action. The plaintiff had a right, where the obligation was joint and several, to sue anyone separately or all jointly. So he had a perfect right to sue severally on one cause of action growing out of the note, and jointly on another. We do not deem it necessary to enter into a discussion of the authorities referred to by counsel for respondents under this proposition. They refer to suits commenced on a joint obligation. It is not necessary here to discuss the question whether, if the note were a joint note and a suit had been commenced against one joint maker, a joint suit could be afterward maintained against all upon the same cause of action. We think the position of counsel for respondents on this proposition is untenable, and do not deem it necessary to further discuss it.

It is further claimed that evidence of the suit against Yakel could not be interposed, because no proper foundation had been laid in the complaint. True, facts which amount to an estoppel in pais must be pleaded if there be an opportunity to plead them, but the former adjudication is admissible in evidence without pleading it: Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; 2 Herman on Estoppel, sec. 1261; Southern Pac. R. Co. v. United States, 168 U. S. 1, 55, 18 Sup. Ct. Rep. 18, 42 L. ed. 355. The evidence, therefore, should have been admitted as evidence of a former adjudication against him. The offer was to show a judgment against Yakel and not against all of the defendants, and, it appearing that the other defendants were neither parties nor privies in such action, the judgment would not be binding upon them, and the question arises whether it was binding upon Yakel upon a dif-

ferent cause of action. The rule is that, where the causes of action are different, a former adjudication between the same parties is binding only as to matters actually litigated and determined. It was stated in the offer that the same defenses were made and the same matters in issue in the suit against Yakel as in the instant suit, [469] and that judgment was rendered in that action against defendant Yakel. From this it would appear that the offer was competent and the evidence should have been admitted: Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195. It is quite apparent from the offer that the purpose of plaintiff's claim under it was to show that a trial was had in the former suit against Yakel upon the same issues, and that the same issues were actually litigated, tried and determined in that suit as set up in the present suit. Evidence was admissible to show these facts and should have been admitted. Had the plaintiff succeeded in proving his offer to the effect that the same issues were raised, litigated and determined in the suit against Yakel for interest, such judgment would have been binding upon defendant Yakel in this action: Wentworth v. Racine Co., 99 Wis. 26, 74 N. W. 551; Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195.

3. The third error assigned has reference to the charge of the court to the jury respecting the fraud and duress in procuring the signatures to the note, and whether the makers knew the nature of the instrument, or could have obtained knowledge by the use of ordinary care. From the view we have taken of the case it becomes unnecessary to consider this assignment of error. It does not appear that defendants ever returned or offered to return the horse, or rescinded the contract, but with knowledge, or reasonable means of knowledge, of the facts commenced their action to recover damages based upon the existence of a contract which they claimed they were induced to make by fraud and deceit, the fruits of which contract, so far as the record shows, they still continued to hold at the time of the commencement of the action for damages. In doing so, they affirmed the validity of the contract made, which resulted in the giving of the note in suit. The commencement of the suit was as effectual in determining their position as though they had recovered the damages which they claimed, and it is very clear that, if they had succeeded in recovering [470] such damages, they would have no standing in their defense to the note. After the evidence was in, counsel asked that a verdict be directed for plaintiff, which was de-

nied. We think this was error, and that upon the showing made the plaintiff was entitled to judgment against all defendants.

By the COURT. Judgment of the court below is reversed, and the cause remanded with instructions to enter judgment for plaintiff against all the defendants.

The Determination of the Validity of municipal bonds in an action on interest coupons is conclusive in a subsequent action between the same parties to recover on other coupons attached to the same bonds: Garden City v. Merchants' etc. Bank, 65 Kan. 345, 93 Am. St. Rep 291. See, too, Rew v. Independent School Dist., 125 Iowa, 28, 106 Am. St. Rep. 282.

A Person Entitled to an Election between inconsistent remedies will be confined to the one which he first prefers and adopts: Nanson v. Jacob, 93 Mo. 331, 42 Am. St. Rep. 531; Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317; Kearney Milling etc. Co. v. Union Pacific Ry. Co., 97 Iowa, 719, 59 Am. St. Rep. 434; notes to Thomas v. Joslin, 1 Am. St. Rep. 626; Fowler v. Bowery Sav. Bank, 10 Am. St. Rep. 487. However, a person does not make an election between inconsistent remedies unless he in fact has them. Hence, the institution of a fruitless action, which one has no right to maintain, does not preclude him from asserting the rights he really possesses: Fuller-Warren Co. v. Harter, 110 Wis. 80, 84 Am. St. Rep. 867; Agar v. Winslow, 123 Cal. 587, 69 Am. St. Rep. 84.

FANNING v. MURPHY.

[126 Wis. 538, 105 N. W. 1056.]

AGREEMENT to Pay the Debt of Another.—Where one, on a consideration moving to him from another, agrees to pay the latter's debt to a third person, such as an agreement by a grantee of real property that he will pay the indebtedness of his grantor secured upon such property as the consideration in whole or in part for the conveyance, the promisor becomes absolutely bound to the third person, regardless of whether he has knowledge of the matter or renders any consideration for his new security. (pp. 949, 950.)

RIGHTS of One Whose Debt a Third Person has Agreed to Pay.—Where a person, upon a sufficient consideration from another to him, agrees to pay a debt due from the latter to a third person, the relation between the promisor and such third person becomes that of principal and surety, so that, in the event of the third person paying the debt, he has a remedy against the principal. (p. 950.)

DUTY of One Whose Debt a Third Person has Agreed to Pay.—When, upon a sufficient consideration, one party to a contract agrees to pay the debt of another to a third person, the latter becomes bound to treat his original debtor as though his liability were that of a surety only, and hence not to do any act which would

discharge a surety, as, for instance, extending the time for the payment of the indebtedness. (p. 951.)

PRACTICE.—Findings Should Never be in the Form of a Résumé of the Evidence, nor should they include matters of argument in support of the conclusions. (p. 952.)

SURETIES.—By the Voluntary Payment of an Obligation, a surety cannot make his cosurety liable. Compulsory payment by the surety is essential, but he is not required to wait until a creditor extorts payment from him. (pp. 952, 953.)

SURETIES—Payment by One, When Will not be Deemed Voluntary as Against Another.—Whenever a surety pays a debt because his liability has become fixed by his principal's default, the payment is not voluntary. (p. 953.)

SURETIES, Right of to Contribution When One has Taken up Indebtedness and Procured an Assignment.—Where a surety's liability has become fixed by the default of his principal and the surety takes up the note for the sole purpose of discharging his liability as surety and preserving his rights of subrogation and contribution, the mere fact that he does so in the form of a purchase of the securities does not militate against its being a payment for the purpose of enforcing contribution from a cosurety. (p. 953.)

SURETIES—Delay in Coercing Payment of Indebtedness.—The payee of an instrument having a principal obligee and a surety owes no duty of active vigilance to the latter to enforce the collection of the indebtedness. The way is open to the surety, at any time after default of the principal, to pay the debt and reimburse himself by enforcing the obligation of the principal and of the cosureties, if there be any. (pp. 953, 954.)

SURETIES—Extension of Time of Payment, What is not.—The mere fact that after a request for the extension of the time for payment, and the granting thereof, the creditor indorses the result upon his loan register, does not establish an enforceable agreement for such extension or cut any figure whatever. (pp. 954, 955.)

SURETIES—Extension of Time, Payment of Interest as a Consideration for.—The payment of interest on a debt according to the terms of an obligation does not constitute any consideration for an agreement to extend the time for the payment of the principal. (p. 955.)

SURETY'S EXTENSION of Time for Payment, Valid Agreement for, When not Shown.—The fact that the payee of an obligation indorses thereon a memorandum of the extension of time for payment and of a reduction of the rate of interest, followed by the receipt of such diminished interest, does not establish a binding contract for an extension, and thereby release his surety. (p. 955.)

SURETY'S AGREEMENT Extending Time for Payment, When Sufficient to Release Surety.—A valid agreement for the extension of the time for the payment of a note must have all the essentials of a binding contract and be reasonably definite as to time. There must be a good equivalent for the extension, such a consideration as will so tie the hands of the obligee as to disable him from enforcing the obligation until the expiration of the time agreed upon. That equivalent must be something other than what the law would have awarded to the obligee in case of a mere extension of time of performance, regardless of any pretense of contract to do so. It must be something different from, and entirely additional to, what would accrue in favor of the obligee if he merely allowed the note to run from day to day. (p. 958.)

Action to foreclose a mortgage and obtain a judgment enforcing the personal liability of one claimed to be liable for the mortgage indebtedness. On April 15, 1890, J. T. Murphy, D. C. Sullivan, M. Murphy and W. R. Fanning mortgaged their lands to the Superior and Duluth Loan and Debenture Company to secure the payment of their note for five thousand dollars, due three years after date, with interest at the rate of eight per cent per annum, payable semi-annually. The note and mortgage were, on September 18, 1893, assigned to the Northern Trust Company, which, on October 19, 1896, assigned to Mary A. McNealy, who five days later assigned to the plaintiff.

On April 16, 1890, the mortgagors conveyed the mortgaged property to W. R. O'Hearn, who assumed and agreed to pay as part of the consideration for the conveyance the mortgage indebtedness. Two days later he conveyed a two-thirds interest to R. C. Jones and Edgar A. Le Clair, who, as part of the consideration for the conveyance, assumed and agreed to pay a corresponding part of the mortgage indebtedness. On June 15, 1890, Edgar A. Le Clair conveyed his interest to O'Hearn and Jones, who assumed and agreed, as a part of the consideration, to pay one-third of the indebtedness. After O'Hearn acquired an interest in the property, he for himself and Jones, on April 16, 1890, paid and took up some past due interest coupons. On April 11, 1893, O'Hearne and Jones, then being the sole owners of the mortgaged premises, applied for an extension of the time of payment for one year. The application was granted by the holder of the note, who then indorsed on the back thereof the following: "This note, by mutual agreement, is extended for one year from April 15, 1893, at 8 per cent payable semi-annual, interest having been paid to April 15, 1893, and all coupons surrendered."

After the Northern Trust Company became the owner of the securities, on default in respect to both principal and interest, it threatened collection against the property of the plaintiff, who, upon a promise of J. T. Murphy to pay his proportion of the indebtedness as soon as able, paid the amount due on the note and caused the securities to be assigned to Mary A. McNealy, being advised by counsel that this course was best calculated to protect his rights against the other parties liable upon the paper. On May 28, 1902, the plaintiff commenced an action against J. T. Murphy to recover the latter's proportion of the burden of discharging

the mortgage indebtedness, and alleging that the other co-makers to the note were nonresidents or insolvent. On June 28, 1902, plaintiff commenced an action against all persons interested in the real estate and all those supposed by plaintiff to be personally liable for the mortgage indebtedness. The two actions were consolidated and tried as one. The only person appearing and defending the action was J. T. Murphy. He, after plaintiff's purchase of the note and mortgage, promised on several occasions to pay his proportion of the indebtedness.

The trial court found that by reason of the provisions of the deeds to which O'Hearn, Jones and Le Clair were parties, they became principal debtors, and T. J. Murphy, M. Murphy, Sullivan and Fanning, sureties; that there was no binding contract extending the time for the payment of the note; that Fanning was entitled to foreclosure, as prayed for in the complaint, and to a judgment for the deficiency against the defendant Murphy for one-half of the amount of whatever deficiency there might be. Judgment having been entered accordingly, the defendant Murphy appealed.

John Brennan and Louis Hanitch, for the appellant.

H. H. Grace, for the respondent.

543 MARSHALL, J. There are many decisions of this court as regards the status of one who has for a consideration moving to him from another agreed to pay the latter's debt to a third person, such third person being a stranger to the transaction, such as the agreement involved here where the grantee of realty assumed and agreed to pay the indebtedness of his grantor or some other party secured upon such property as consideration in whole or in part for the conveyance. The subject was last fully discussed by this court in Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003, 93 N. W. 440, 61 L. R. A. 509, the most significant 544 of the previous decisions of the court being referred to. It was there said that upon the transaction being completed between the parties thereto, the promisor becomes absolutely bound to the third person, regardless of whether he has any knowledge of the matter or renders any consideration for his new security; that no privity between the promisor and the third party is essential to the liability, except that which the law operating upon the acts of the parties creates. The idea that the law so operating will create such privity, enabling the

third person to enforce by action at law the promise made for his benefit, and that nevertheless his status as regards the promisor may, after the happening of the transaction creating it, be changed without his consent, was rejected. The relations existing between the promisor and the promisee in such circumstances, it has been said, are those of principal and surety—that the promisor takes the place of his promisee, the latter becoming surety for him, so that in the event of such promisee paying the debt he has his remedy over against his promisor: Stites v. Thompson, 98 Wis. 329, 73 N. W. 774. Whether, in such circumstances, as regards the creditor, the status of the original debtor is changed to that of a surety, does not seem to have been heretofore decided by this court.

In those jurisdictions where the nature of the relations between the promisor and a third person is held to be the same as it is here, in respect to the former being equitably and legally liable to the latter, it has been held that a variance of the original contract between a third person and the debtor without the consent of the original debtor discharges the latter from all liability, where a similar variance by agreement between any principal obligor and obligee would discharge the surety, it being said in terms or in effect that the third person, upon being informed of the relations between the parties to the transaction affording him the aditional security, becomes in duty bound to protect the interest of the original debtor to the extent of dealing with the person who has agreed [345] to take his place as the one primarily liable for the debt as if the sole liability of the original debtor were that of a mere surety: Home Nat. Bank v. Estate of Waterman, 134 Ill. 461, 29 N. E. 503; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Palmer v. Purdy, 83 N. Y. 144; Grow v. Garlock, 97 N. Y. 81; Guild v. Butler, 127 Mass. 386; Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. Rep. 437, 36 L. ed. 118; Wayman v. Jones, 58 Mo. App. 313; Spencer v. Spencer, 95 N. Y. 353; George v. Andrews, 60 Md. 26; Metz v. Todd, 36 Mich. 473; Commercial Bank v. Wood, 56 Mo. App. 214. The federal supreme court in the case cited, speaking of the doctrine which obtains here, that one who is the beneficiary of a promise made by the grantor of mortgaged premises to pay the mortgage indebtedness, that one being a stranger to the transaction, may enforce the promise at law, and that the promise is irrevocable without his consent, said: "Where such is held to be the

relation of the parties, the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the consent of the grantor, extending the time of the payment of the mortgage debt, discharges the grantor from all personal liability for that debt."

In Wayman v. Jones, 58 Mo. App. 313, it was said that "there is no distinction between a suretyship created with the consent of the creditor and that which arises by operation of law. The principle is applicable alike in both cases, as is abundantly shown by the authorities."

The learned counsel for appellant as a basis for their claim that appellant was discharged from all liability for the payment of the mortgage indebtedness by the transaction mentioned in the statement between O'Hearn and the owner of such indebtedness, contend that the law is as above stated, and to that extent it seems that counsel's position is sound. Therefore, at the time of the alleged extension of the time for [546] payment of the mortgage indebtedness, as regards all parties to the litigation, W. R. O'Hearn, R. C. Jones and Edgar A. Le Clair were principal debtors, and J. T. Murphy, D. C. Sullivan, M. Murphy and W. R. Fanning were sureties. However, if the agreement for the extension was not binding for want of a consideration to support it, if notwithstanding such agreement such owner was left free to enforce payment of such indebtedness after the due date thereof, according to the conditions of the note, and the sureties were free to take up the same and protect themselves from loss in the ordinary way in such cases, the entire groundwork of appellant's position fails, leaving nothing in the record affecting, prejudicially, his liability to respondent as a cosurety, except some minor matters which are inefficient to affect the situation, as we shall see.

We do not overlook the criticism of counsel upon the failure of the trial court to find distinctly as to whether respondent bought the note, leaving no enforceable claim against appellant, except upon the note itself, and the importance of the statute of limitations, if such were the fact, or whether he paid it under compulsion, creating a liability upon the part of appellant to contribute his proportionate share as cosurety. The findings in this respect, and in general, as regards the judicial duty under section 2863 of the Statutes of 1898, as explained in Farmer v. St. Croix P. Co., 117 Wis. 76, 98 Am. St. Rep. 914, 93 N. W. 830, are deficient. They are consider-

ably encumbered with mere evidentiary matters, instead of such matters being entirely omitted, as they should be, and only facts in issue and pleaded facts and the resulting conclusions of law being included. Findings should never be put in the form of a résumé of the evidence, as they often are, nor should they include matters of argument in support of the conclusions. Mischief in that regard, in the opinion of the writer, is the natural result of permitting counsel for the prevailing party to formulate the manner in which the court shall pronounce its decision. [547] Counsel, however able and however appreciative of the duty of the court to speak judicially in rendering its decision, and as the statute commands, are counsel still, and the product of their efforts to present to the court a form for its decision is very likely to partake, significantly, of partisan features: to be in the nature of findings of fact supported by evidence and argument, with such findings so obscured by, or involved in, other matters as to require diligent search therefor in order to enable one to discover the same. It is a mistake, as it seems, to suppose that such features add to the stability of the judgment. Findings, covering in logical order the pleadable and pleaded facts, in concise and strictly judicial language, as the law requires, are by far the safest basis for a judgment to rest upon.

On the point raised by counsel as to whether respondent came by the note and mortgage by purchase with the idea of making an investment, it seems from the evidence and findings that his whole purpose was to protect himself against loss, so far as practicable, by taking up the securities and resorting to the mortgaged property and the liability of his cosureties for reimbursement. He did not act in the matter until the persons primarily liable were in default, nor until he was pressed for payment by the holder of the note and menaced with the probability of his property being taken in some way to discharge the debt, if he did not provide for it. True, the transaction was in the form of a bargain and sale and respondent testified repeatedly that he bought the securities, but he also said over and over again, in terms or in effect that he acted under advice of counsel and had only in mind protection of himself against loss. There is nothing to indicate that he bought the paper as an investment, or paid it voluntarily. It seems very clear that, as regards the liability of his cosureties as contributors, his act in taking up the note and mortgage extinguished the original debt.

True, it was not permissible for respondent to voluntarily
548 pay the note and then hold his cosureties liable. Compulsory payment was essential to their liability, but the surety, in order to satisfy that, is not required to wait until the creditor extorts payment from him. As soon as the principal debtor makes default the surety may pay the indebtedness and seek contribution of his cosureties, if there be such. Payment under those circumstances is, in legal effect, compulsory. In contemplation of law, the act is characterized by a request from the cosurety, if there be such, to the one acting in the matter to pay the debt, and a promise on the part of the former to contribute his proper proportion. Thus a cosurety is liable to contribute to the one making the payment, both upon the ground of equitable and legal obligation: 1 Brandt on Suretyship, 3d ed., sec. 319; 27 Am. & Eng. Ency. of Law, 2d ed., 485, and cases cited. The idea is that whenever a surety pays a debt because his liability has become fixed to do so by his principal's default, it is not voluntary, and when in such circumstances he takes up the note for the sole purpose of discharging his obligation as surety and preserving his rights of subrogation and contribution, the mere fact that he does so in the form of a purchase of the securities does not militate against its being in fact a payment for the purposes mentioned.

The learned counsel for respondent fails to make clear in his brief the theory, as he views the matter, upon which the liability of appellant was adjudged, respecting whether the learned trial court held that respondent paid the note or bought it as an investment relying upon the verbal promise of appellant to pay his due proportion. The findings are very indefinite in respect to the matter. We agree with the learned counsel for appellant as to its being very difficult to see clearly from the decision the supposed underlying principles of it. The recovery cannot be sustained upon the mere obligation of appellant to respondent as cosurety, without there was, in effect, at least, a payment of the indebtedness by
549 respondent under compulsion, as before indicated. As it seems to us, however, the essential facts in that regard are established by the evidence.

It is suggested by counsel that appellant was released by laches of the holder of the note and mortgage, in that he did not proceed with diligence to collect the indebtedness after the same became due. The conclusive answer to that is, as

counsel for respondent suggests, the payee of an instrument having a principal obligor and surety owes no duty of active vigilance to the latter to enforce collection of the indebtedness. The way is open to the surety at any time after default of his principal to pay the debt and reimburse himself by enforcing the obligation of such principal and the cosureties, if there be such: Harris v. Newell, 42 Wis. 687; Updike's Admr. v. Lane, 78 Va. 132; Alexander v. Byrd, 85 Va. 690, 8 S. E. 577.

"The surety has no right to say that he is discharged from the debt if all he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him, the surety, the means of suing": Lord Eldon in Eyre v. Everett, 2 Russ. 381.

So, as it is said, the duty of activity is imposed by law on the surety to protect himself rather than on the creditor to protect him.

The foregoing covers all the matters discussed in the briefs of counsel which are considered of sufficient importance to warrant special mention in this opinion, except the question of whether there was a valid extension of the note, in view of the conclusion we have reached in respect to that matter. It is conceded that, waiving other questions which have been decided adverse to appellant, he cannot recover unless his obligation of suretyship was discharged by a valid extension of the time for payment of the note by the agreement between O'Hearn and the Superior and Duluth Loan and Debenture Company.

550 As indicated in the statement, the transaction as to the extension consisted of a request by O'Hearn on behalf of himself and Jones, who were the principal debtors, made before the note was due, for an extension of the time of payment thereof, and the granting of such request. Some significance is claimed for the circumstance that the holder of the note, after such request and consent, entered the result upon the loan register as a renewal of the loan, but we are unable to perceive how the mere bookkeeping feature of the matter, with which O'Hearn was in no way concerned, cuts any figure whatever. Further significance is claimed for the fact that after the extension agreement, so called, was made, respondent paid an installment of interest, which fell due three days after such extension. The payment of interest was not

a condition of the extension, and if it were otherwise, such payment was only compliance with the obligation of the payor independently of any extension. It cannot be properly referred to as a consideration supporting a new contract. The law is well settled, as will be hereafter more fully seen, that neither payment of the principal of a debt, or any part thereof, nor payment of interest thereon according to contract, constitutes a consideration for an extension: Stroud v. Thomas, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; Woolford v. Dow, 34 Ill. 424; Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; Wilson v. Powers, 130 Mass. 127; Mathewson v. Strafford Bank, 45 N. H. 104; Wheeler v. Washburn, 24 Vt. 293.

Reference is made to the fact that some days after the transaction, as regards the extension, was concluded between the parties, without the knowledge and in the absence of O'Hearn, and without any subsequent notice to him thereof, an indorsement was placed on the back of the note in these words: "This note, by mutual agreement, is extended for one year from April 15, 1893, at eight per cent payable semi-annual, interest having been paid to April 15, 1893, and all coupons surrendered," and that subsequently interest was [551] paid by O'Hearn in accordance therewith, instead of ten per cent, which was the contract rate in case of the debt not being paid at maturity. It is claimed that such indorsement and payment evidences a binding contract. We cannot view the matter that way. The rights of the parties, whatever they were, became fixed when the request of April 11, 1893, for the extension of the note for one year was granted on April 12th thereafter. If, notwithstanding those circumstances, the holder of the note could have enforced payment at any time after the due date thereof according to contract as to time, the mere unilateral memorandum on the back of the same, made four days after the mutual transaction was completed, did not change the situation, neither did the receipt of money paid as interest, and the indorsement thereof on the back of the paper. The consent of the holder of the note to receive two hundred dollars October 15, 1893, as payment in ful for interest to that time, when he could have demanded two hundred and fifty dollars, did not constitute a consideration for the extension. The rebate was a mere gratuity allowed pursuant to a mere moral obligation, not affecting the relations between the parties in any respect whatever.

The point is made that the transaction was in effect an exchange of promises, the one being the consideration for the other—a promise on the one hand to keep the money for an additional year at the same rate of interest, as before indicated, and a promise on the other to loan the money for such additional year at such rate, Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571, and Benson v. Phipps, 87 Tex. 578, 47 Am. St. Rep. 128, 29 S. W. 1061, being referred to in support thereof. There are many such authorities. A pretty full discussion of them is to be found in Reed v. Tierney, 12 App. D. C. 165. There are still more authorities to the contrary, which, according to substantially the universal judgment of text-book writers, establish the better rule.

The reasoning in support of the first theory, as above indicated, [552] is that consent to an obligation for an extension involves an exchange of benefits, which satisfies to the fullest extent all of the essentials of a consideration. The reasoning in support of the other theory is that such a transaction does not add anything to the obligation of the debtor; that in the absence of it he would be bound to pay the debt and interest anyway, as a condition of retaining the money until such time as it should please the creditor to insist upon payment. It does not appear that this court has passed upon that precise question.

On a matter where there is such a direct and irreconcilable conflict as we find on the one under discussion there is very little to be gained by a lengthy review and analysis of authorities. There is not much that can well be done but to take a position on one side of the conflict or the other, being guided by what appears to be the weight of authority. It seems that such weight is significantly against the proposition contended for by appellant. The following distinctly hold that a request for an extension of the time of payment of a note at the contract rate of interest and consent thereto is not binding, because not supported by a new and independent consideration: Hughes v. Southern W. Co., 94 Ala. 613, 10 South. 133. "It requires an additional valuable consideration to bind the promisee to an observance of even an express promise to indulge": Woolford v. Dow, 34 Ill. 428. It was mutually agreed to extend the time of payment of the note at ten per cent interest. That involved no new consideration. "The note by its terms drew ten per cent interest, and this agree-

ment made no change in its terms as to the rate of interest. The agreement to extend the time of payment was a mere nudum pactum": Crossman v. Wohlleben, 90 Ill. 539, 542. "A mere promise made by a creditor to indulge the debtor for a given length of time, upon the payment of interest, does not bind him to such extension, because the payment of interest is already secured by the terms of the original note [553] for any delay that may occur from any indulgence that might be given": English v. Landon, 181 Ill. 614, 619, 621, 54 N. E. 911. "At about the time of the maturity of the note in suit the principal maker notified the payee that he would like the same to run another year at the same rate of interest. The payee only desired interest on his note, and so notified the principal maker. There is no evidence in this record showing such an extension of time for a specified period and for a specified consideration as was mutually binding on both parties": Kerns v. Ryan, 26 Ill. App. 177; Edmonds v. Thomas, 41 Ill. App. 505; Heenan v. Howard, 81 Ill. App. 629; Dare v. Hall, 70 Ind. 545. An agreement to continue payment of interest at the same rate as that specified in the note, or at a reduced rate, does not constitute a new consideration: Hume v. Mazelin, 84 Ind. 574; Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; Wayman v. Jones, 58 Mo. App. 313; Wilson v. Powers, 130 Mass. 127; Roberts v. Stewart, 31 Miss. 664; Reynolds v. Ward, 5 Wend. 501. A debtor's promise to pay interest on an existing contract and according to its terms during a period of delay in the enforcement thereof, is a promise to do precisely what he is bound to do without a promise. "If the debtor's promise to pay interest creates no additional obligation it is no consideration for a contract to delay": Sully v. Childress, 106 Tenn. 109, 82 Am. St. Rep. 875, 60 S. W. 499; Howell v. Sevier, 1 Lea, 360, 27 Am. Rep. 771; Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940; Harburg v. Kumpf, 151 Mo. 16, 52 S. W. 19; La Belle Sav. Bank v. Taylor, 69 Mo. App. 99. All elementary writers, as before stated, so far as we can discover, are in harmony with these authorities: 1 Brandt on Suretyship, 3d ed., sec. 388; 2 Randolph on Commercial Paper, 2d ed., sec. 768; 2 Daniel on Negotiable Instruments, 5th ed., sec. 1317a.

We are not unmindful of the fact that there are instances where it has been said in legal opinions that the weight of authority is contrary to what we assert. Reed v. Tierney,

12 App. D. C. 165, is one of such instances. But to [554] our minds the writers must have reached a conclusion from a very imperfect examination of the matter.

While, as before indicated, there is no decision of this court precisely on the point, so none interfering with the judicial policy here being established in harmony with the view pressed upon our attention by the learned counsel for appellant, it is believed that the contrary one has been, generally, in business transactions accepted as correct in this state. No good reason is perceived why what seems to be the decided weight of authority in respect to the matter should not be followed. The decisions here, so far as they go, are in harmony therewith. They are to the effect that a valid agreement for the extension of the time of payment of a note must have all the essentials of a binding contract; that it must be reasonably definite as to time and there must be an agreed equivalent for the extension—such a consideration as will so tie the hands of the obligee as to disable him from enforcing the obligation until the expiration of the time agreed upon: Riley v. Gregg, 16 Wis. 666; Ready v. Sommer, 37 Wis. 265; Meiswinkle v. Jung, 30 Wis. 361, 11 Am. Rep. 572; Irvine v. Adams, 48 Wis. 468, 33 Am. Rep. 817, 4 N. W. 573; Hamilton v. Prouty, 50 Wis. 592, 36 Am. Rep. 866, 7 N. W. 659; Fay v. Tower, 58 Wis. 286, 16 N. W. 558. That equivalent must be something other than what the law would award to the obligee in case of a mere extension of the time of performance, regardless of any pretense of a contract to do so. It must be something separate from, and entirely additional to, what would accrue in favor of the obligee if he merely allowed the note to run from day to day.

Testing the transaction respecting the alleged extension in question by the foregoing, it was not binding on the holder of the note. There was never a moment of time after it fell due in which such holder was not perfectly free to enforce payment, nor in which the appellant and his cosureties, or either of them, or the parties primarily liable for the debt, or either of them, could not have discharged the debt by payment of it. [555] Neither was there a moment of time after respondent took up the note and mortgage for his protection, in which appellant could not have made contribution and put himself in a position to protect himself from loss, so far as practicable, by resorting to the mortgage security and the liability of his cosureties as freely as respondent could. If there were any loss

which accrued to him by delay in working out the ultimate rights of the parties, the fault was as much his as of anyone else. So there is no ground for exempting him from liability to respondent on the ground of laches. We see no escape from the conclusion that the rights of respondent were fairly vindicated by the judgment appealed from.

By the COURT. The judgment is affirmed.

The following opinion was filed January 16, 1906:

DODGE, J. While I agree with the judgment of affirmance in this case, I do so on the ground that, in the dealings between the principal debtor and the mortgagee resulting in the so-called extension of time, I can find no agreement on the part of the debtor to refrain from payment during the term of such extension. To my mind the whole transaction is consistent with mere indulgence on the part of the creditor, and in no wise inconsistent with a continuation of the privilege, always resting in a debtor, to pay an overdue debt. The proposition declared in the court's opinion as a basis for the conclusion reached, that, even if such a promise on the part of the debtor were in fact made, it would not constitute such consideration for the promise of the creditor to extend as to give it validity, is, however, in my view, so opposed both to reason and authority that I cannot yield it my assent. I agree fully with the rule laid down, and the authorities cited in support of it, that a mere promise by a creditor to grant extension of time, however definite, is of no validity unless there be some new consideration therefor, either a benefit to the creditor or
556 a detriment to the debtor. I also agree that the mere payment or promise of payment of any part of the money, principal or interest, which the debtor is already bound to pay by the terms of the existing note, is not such consideration. But when a debtor, having the right at his pleasure to pay a debt and thus to terminate his liability for interest and to deprive the creditor of an interest-bearing investment for his money, agrees to forego such right for a definite period, I can see no escape from the view that such agreement on his part is both a benefit to the creditor and a detriment to himself such as, according to legal definitions, constitutes a valid consideration for the creditor's promise to forego his right to insist on payment during the same period. We all know that, in ordinary business affairs, investors of money are ready to make various concessions in the way of lower rates of interest and the like

in consideration of receiving a permanent investment in lieu of one which may be terminated at the option of the debtor. Such distinction is considered valuable and worth paying for. It also disables the debtor from paying up and thus saving interest; a valuable right. I am amazed to find in the opinion filed a statement that the weight of authority is against this proposition. I find in its support numerous decisions, among which are the following: Crossman v. Wohlleben, 90 Ill. 537; Dodgson v. Henderson, 113 Ill. 360; English v. Landon, 181 Ill. 614, 54 N. E. 911; Bailey v. Adams, 10 N. H. 162; Fowler v. Brooks, 13 N. H. 240; McComb v. Kittridge, 14 Ohio, 348; Wood v. Newkirk, 15 Ohio St. 295; Fawcett v. Freshwater, 31 Ohio St. 637; Chute v. Pattee, 37 Me. 102; Brown v. Prophit, 53 Miss. 649; Simpson v. Evans, 44 Minn. 419, 46 N. W. 908; Dillaway v. Peterson, 11 S. Dak. 210, 76 N. W. 925; Shuler v. Hummel (Neb.), 95 N. W. 350; Eaton v. Whitmore, 3 Kan. App. 760, 45 Pac. 450; Green v. Lake, 2 Mackey, 162; 2 Hare & W. Ld. Cas., 5th ed., 469; Reed v. Tierney, 12 App. D. C. 165; Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571. I find it assumed, as unquestionable, [557] by our own court in Templeton v. Butler, 117 Wis. 455, 94 N. W. 306, and when I turn to the authorities cited in the opinion as in conflict therewith, I find none of them to so conflict. Of the text-writers said to oppose it, I find in 1 Brandt on Suretyship, third edition, section 388, the declaration that the better opinion is that the surety is discharged in such case, and that the reasoning upon which the rule is founded is invincible; while I find that neither of the other text-writers cited refers to the subject at all, either in approbation or disapproval, in the treatises cited, but that Mr. Randolph declares it to be supported by the weight of authority in his article on Commercial Paper, 7 Cyclopedia, 902.

Examining the cases cited in the opinion as conflicting with the rule that a definite promise to retain the money at interest during a specified term is sufficient consideration to support an agreement by the creditor to extend, for which I contend, I find them to go no further than to declare the proposition that a mere promise to pay interest at the rate fixed by the former contract, so long as the creditor forbears collection, is no consideration, because it is the legal obligation already resting on the debtor, and his promise, therefore, adds nothing of detriment to him or benefit to his creditor; with which I fully agree. True, some of these cases are based upon agree-

ments which might be construed to include agreement of the debtor that he would retain the money, but in none of these is any such construction declared nor its effect to validate the extension at all discussed. In Illinois, however, whence are taken most of the citations, the distinction is clearly drawn. Thus, in Crossman v. Wohlleben, 90 Ill. 537, in dealing with a promise to extend upon a promise to pay interest at the old rate, it is said: "It is essential that both parties shall be bound by the contract. In the case at bar there is no consideration shown either *by a promise on the part of the debtor to keep the money for any given time and pay interest for that time* or [558] by paying the interest in advance." (Italics mine.) Heenan v. Howard, 81 Ill. App. 629, is entirely similar. But in Dodgson v. Henderson, 113 Ill. 360, where the debtor did expressly agree to keep the money, the court held: "The agreement to keep the money another year and pay the interest thereon was a sufficient consideration for the promise of the payee to extend the time of payment." Approved in English v. Landon, 181 Ill. 614, 54 N. E. 911.

In Mississippi, too, whence is cited Roberts v. Stewart, 31 Miss. 664, which fully adopted the rule of Reynolds v. Ward, 5 Wend. 501, and of the Indiana cases, the distinction for which I contend was at once recognized as nowise inconsistent in Brown v. Prophit, 53 Miss. 649. The Wisconsin cases go no further than to demand generally that an agreement for an extension, like any other contract, must have a consideration either of benefit to the creditor or disadvantage to the debtor. That a promise waiving the debtor's option to pay at will, when evidenced by a new promissory note, is such a consideration, is expressly held in Omaha Nat. Bank v. Johnson, 111 Wis. 372, 87 N. W. 237, and that a verbal promise to forego payment is also, was assumed, as already stated, in Templeton v. Butler, 117 Wis. 455, 94 N. W. 306.

When a proposition is supported by unassailable reasons and by all the authority speaking expressly on the subject, I think it should not be repudiated, but adhered to.

A Surety is Ordinarily Discharged where the creditor gives further time for payment to the principal debtor: Price v. Dime Sav. Bank, 124 Ill. 317, 7 Am. St. Rep. 367; Gillett v. Taylor, 14 Utah, 190, 60 Am. St. Rep. 890. To have this effect, however, there must be a consideration for the extension of time: Davis v. Stout, 126 Ind. 12, 22 Am. St. Rep. 565; Saint v. Wheeler etc. Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 210; Sully v. Childress, 106 Tenn. 109, 82 Am.

St. Rep. 875. A contract between a debtor and creditor that the time for paying the debt shall be extended one year, and the former shall forego the right to payment before the expiration of that time, and will pay interest, is a contract founded upon a sufficient consideration, and therefore releases the surety of the debtor: Benson v. Phipps, 87 Tex. 578, 47 Am. St. Rep. 128. See, also, Bugh v. Crum, 26 Ind. App. 465, 84 Am. St. Rep. 307; Strand v. Thomas, 139 Cal. 274, 96 Am. St. Rep. 111.

An Agreement by One Person to Pay his debt to another by paying it to a third person does not require that there be any consideration for the promise between the immediate promisee and the third person: Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003. See the monographic note to Baxter v. Camp, 71 Am. St. Rep. 176, on contracts for the benefit of third persons. Where one for a sufficient consideration agrees to pay the debt of another, the promisor becomes the principal obligor and the promisee the surety; and if the creditor accepts the promise, he becomes bound to observe the relation of principal and surety existing between such parties: Malanaphy v. Fuller etc. Mfg. Co., 125 Iowa, 719, 106 Am. St. Rep. 332.

The Right of One Surety to contribution from another and the remedies for its enforcement are discussed in the monographic notes to Gross v. Davis, 10 Am. St. Rep. 639-647; Culford v. Walser, 70 Am. St. Rep. 443-454. The right of sureties to subrogation is discussed in the monographic note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 506-512.

CASES

IN THE

SUPREME COURT

OF

WYOMING.

FRANK v. STRATFORD-HANDCOCK.

[13 Wyo. 37, 77 Pac. 134.]

SPECIFIC PERFORMANCE Against Grantee with Notice.—A purchaser of real property with notice of a prior contract to convey it to another takes it subject to the equitable rights of the original contractor to a completion of his bargain, and may be compelled in equity to perform the contract of his vendor; and upon a bill filed by the original vendee against the vendor and such subsequent purchaser, the proper practice is to direct a specific performance of the contract by the subsequent purchaser, in whom resides the legal title. (pp. 968, 969.)

SPECIFIC PERFORMANCE—Mutuality of Obligation and Remedy.—The rule that there must exist, as a prerequisite to specific performance, both mutuality of obligation and remedy, has been very much narrowed in modern equity practice. (pp. 969, 970.)

SPECIFIC PERFORMANCE—Option to Purchase.—The doctrine that there must exist, as a prerequisite to specific performance, mutuality of obligation and remedy, does not apply to optional contracts of the sale of land, founded upon a sufficient consideration. (p. 970.)

SPECIFIC PERFORMANCE—Option to Purchase.—An agreement to convey land, founded upon a proper consideration, may be specifically enforced, upon an acceptance and tender of the price within the time specified, and it is no objection that prior to such acceptance and tender no obligation rested upon the option holder to purchase. (p. 971.)

OPTION TO PURCHASE—Revocation or Withdrawal.—An optional agreement to convey land, made upon proper consideration, cannot be revoked by the vendor within the period granted for the exercise of the option, but a mere proposal, without consideration, may be withdrawn at any time before acceptance. (p. 971.)

OPTION TO PURCHASE—Effect of Acceptance.—When an option, given upon a consideration, is accepted within the time allowed, and according to its terms, the offer and acceptance constitute a contract of sale; and the same result flows from the acceptance of

an offer without consideration, if accepted before the offer is withdrawn or revoked. (p. 971.)

OPTION TO PURCHASE.—An Agreement in a Lease granting the lessee the privilege of purchasing the premises within a stated period upon specific terms is regarded as a continuing offer to sell which cannot be revoked during the period prescribed for the exercise of the option. If no other consideration is stated or shown, the lease itself, with the affirmative covenants of the lessee, is considered a sufficient consideration for the agreement to convey at the lessee's option. (p. 972.)

CONDITIONS PRECEDENT are to be Strictly complied with. (p. 973.)

A CONDITION PRECEDENT is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. (p. 973.)

CONDITIONS.—Whether a Condition is Precedent or Subsequent depends upon the intent of the parties as collected from the whole contract, although certain words are customary where a condition rather than a covenant is intended. (p. 973.)

LEASE—Condition Precedent—Deposit by Lessee as Security for Performance.—Where, in an agreement purporting to be a lease, the lessee agrees to pay as rental the taxes for the current year, to restrict the use of the premises in certain respects, and to deposit a specified sum with the lessor as security for the faithful performance of the lease and the payment of the taxes, the provision for the deposit is a condition precedent to the lease becoming operative or effective. (p. 976.)

LEASE—Failure to Perform Condition Precedent—Possession by Lessee.—The fact that a lessee is in possession of the premises at or before the signing of the lease does not impart vitality to the lease, if he fails to perform a condition precedent to the lease becoming operative. (p. 976.)

OPTION TO PURCHASE—Lease as Consideration.—A lease which does not become operative because the lessee fails to perform a condition precedent cannot serve as a consideration for an option therein given the lessee to purchase the premises during the term, and the lessor may therefore revoke the option at any time before acceptance (p. 977.)

OPTION TO PURCHASE—Revocation by Conveyance.—Where a lessor gives his lessee an option to purchase the premises during the term, but the lease, which is the sole consideration for the option, does not become operative because of the failure of the lessee to perform a condition precedent, a bona fide conveyance of the property by the lessor to a third person, brought to the knowledge of the lessee before any attempted acceptance of the option, amounts to a revocation of it. (p. 977.)

SPECIFIC PERFORMANCE—Tender—To Whom Should be Made.—If a lessor gives his lessee an option to purchase the premises during the term, but, while the option is still in force, conveys the property to a third person, the lessee may properly tender performance to the lessor, and thereupon he and his grantee with notice become bound to make a conveyance. (p. 979.)

OPTION TO PURCHASE—Right to Possession.—The holder of a mere option to purchase land is not entitled to possession, in the absence of an express stipulation to that effect, at least until he has tendered the purchase price and demanded a deed. (pp. 979, 980.)

Nichols & Adams, W. S. Metz and Gibson Clark, for the plaintiffs in error.

E. E. Enterline and H. A. Adams, for the defendant in error.

47 POTTER J. S. Henrietta Carlile-Kent sued the plaintiffs in error, Abe Frank and Grace E. McKenzie, for the specific performance of an alleged contract for the conveyance of certain lands situated in Crook county entered into by Frank, the grantor of Mrs. McKenzie, and damages for taking and withholding possession of the premises. The 48 allegations of the first cause of action are substantially that on April 4, 1901, Frank was the owner of the lands, and on that date entered into a written agreement with plaintiff which is set out in haec verba; that thereafter, and on the same day, plaintiff went into possession of the premises under the terms of the agreement and remained in possession until July 26, 1901, when Mrs. McKenzie forcibly and wrongfully evicted her; that on September 20, 1901, plaintiff tendered the purchase price to defendant Frank and demanded a deed, which was refused; that plaintiff has duly performed all the conditions of the agreement on her part to be performed, and brings the purchase price into court, and offers it to defendant Frank upon his executing and delivering a conveyance according to the contract; and that on April 17, 1901, Frank wrongfully sold and conveyed the premises to the defendant McKenzie, who had full knowledge of the agreement between the plaintiff and Frank.

The second cause of action is based upon the alleged wrongful eviction of plaintiff and the withholding of possession, and charges that the same occurred under the direction of the defendant Frank, and there are certain averments of special damages.

The agreement set out in the petition, and which was introduced in evidence, is in form a lease for the period of six months from April 1st, containing a clause giving the lessee, the plaintiff below, the right to purchase the premises at any time within said six months upon the payment of five thousand dollars, with interest at the rate of eight per cent per annum. The alleged right to specific performance is based on that clause. The plaintiff as lessee covenanted to pay as rental the taxes on the premises for the current year 1901, to have the fences and buildings in good repair, and not to

pasture upon a certain portion of the land designated as "the bottom pasture" to exceed ten head of saddle and work horses and two milch cows. It was agreed that she should have full use of "back pasture" for her own [49] stock, and that she should not have the right to turn stock upon the hay meadows, nor be allowed to pasture upon certain specified "ranches." It was also agreed that in the event she should not purchase the premises within the time granted, one-half of the hay crop and one-third of the other crops raised on the land should belong to the lessor Frank. The lease then concludes with the following provision: "It is further agreed that the party of the second part (the lessee) shall deposit with the party of the first part the sum of five hundred dollars for the faithful performance of this lease, and the payment of the taxes as aforesaid." The paper is signed by both parties.

The answer not only denied the allegations of the petition as to the eviction of plaintiff, but averred that the latter had voluntarily delivered possession to the defendant McKenzie. There was some conflict of evidence on that issue, and the trial court determined it in favor of the plaintiff, expressly finding that on July 26, 1901, Mrs. McKenzie, with the consent and connivance of the defendant Frank, took possession of the premises against plaintiff's consent, and continued to withhold possession; and that plaintiff never voluntarily surrendered it. The point of conflict in the testimony was as to whether or not the plaintiff had voluntarily surrendered possession. Upon that question the finding of the trial court will be accepted, and, so far as material, the fact will be considered as established that Mrs. McKenzie took possession of the premises against plaintiff's consent. It is not denied that she continued in possession. In the view we are constrained to take of the case under the issues and proof, Frank's alleged connection with the act of Mrs. McKenzie in taking possession may not become material, but we deem it proper to say that the evidence totally failed to connect him with that act in any way, unless the fact that he had previously conveyed the land ought to be given that effect, which is at least doubtful. There is not the slightest evidence outside the mere fact of his conveyance that Frank either consented to or aided in [50] the act of taking possession, or that he even knew of it until after it had occurred.

The remaining material averments of the answer are in substance and effect that the privilege given to the plaintiff to

purchase the premises was without consideration; that there was lack of mutuality in the contract for the sale; and that the lease never became operative for the reason that plaintiff (the lessee) failed to make the deposit required by the contract for her faithful performance of the lease and the payment of the taxes, which it is alleged was a condition precedent to the acquirement of any right by the plaintiff under the lease. The reply met these averments, first, by a general denial; second, by alleging that the defendant Frank never demanded that the five hundred dollars mentioned in the agreement be deposited with him, and, third, that said Frank never demanded of the plaintiff that she comply with any or all the terms of the agreement, and never notified plaintiff that she had violated any of such terms.

The case was tried to the court on all the issues, and there was a separate statement of the conclusions of fact and law. Briefly stated, the conclusions of fact were as follows: That plaintiff substantially complied with the terms and conditions of the contract; that she was in possession of the premises prior to and at the time of the execution of the contract, and at the time of the execution of the deed from Frank to Mrs. McKenzie, and until July 26, 1901; that Mrs. McKenzie took her deed with full knowledge and notice of the terms and conditions of the contract set up in the petition; that plaintiff never recognized the validity of the deed to Mrs. McKenzie, but always insisted on her rights under the contract and did not voluntarily surrender possession; that, with the consent and connivance of Frank, Mrs. McKenzie wrongfully took possession against plaintiff's consent and continued to withhold possession; that plaintiff tendered the purchase price to Frank (five thousand two hundred dollars) September 20, 1901, within the life of the [51] contract, and then demanded a deed, and has kept the tender alive by bringing the money into court; that defendant Frank had failed to execute and deliver a deed to plaintiff; that plaintiff had been damaged by the wrongful entry and withholding possession in the sum of one thousand (1,000) dollars. Upon these conclusions of fact and the admissions in the pleadings, the conclusions of law were, to state them briefly, as follows: That the contract was during its term a valid one and obligated the defendant Frank to convey the lands to plaintiff upon a substanial compliance by her with its terms; that the deed to Mrs. McKenzie ought to be set aside, and the title to the lands quieted in the

plaintiff; that defendant Frank should be required to execute and deliver a deed to plaintiff; that the defendants are wrongfully detaining possession of the lands from plaintiff, and she ought to recover from defendants her damages in the sum of one thousand dollars.

Thereupon a decree was entered in accordance with the conclusions of law. A motion for new trial was filed and overruled; and the defendants prosecute error, assigning as error the overruling of the motion for new trial and the insufficiency of the findings to support the judgment. The motion for new trial challenged each finding of fact and conclusion of law on the ground of insufficiency of the evidence to sustain it, and as contrary to law, as well as the sufficiency of the evidence to support the judgment, and also various rulings of the court on the trial in the admission and rejection of evidence. Since the submission of the cause the defendant in error died and the cause has been revived in the names of her devisee and legal representatives.

Before discussing the questions involved upon the errors assigned, we think attention should be called to the objectionable method adopted in enforcing the alleged right of the plaintiff to a conveyance. There was no claim that Mrs. McKenzie's deed was without consideration, and there was no necessity of adjudging it void and vacating it, nor [52] was that theoretically proper. A purchaser of real property with notice of a prior contract to convey the same to another takes it subject to the equitable rights of the original contractor to a completion of his bargain and may be compelled in equity to perform the contract of his vendor; and upon a bill filed by the original vendee against the vendor and such subsequent purchaser, the proper practice is to direct a specific performance of the contract by the subsequent purchaser, in whom resides the legal title: 2 Warvelle on Vendors, 2d ed., sec. 735; Waterman on Specific Performance, sec. 75; 1 Tiffany on Real Property, sec. 110; Pomeroy on Specific Performance of Contracts, sec. 465. In the case of an executory contract for the sale of land, capable of specific performance, upon the principle that equity regards as done that which ought to be done, the equitable estate is considered as vested in the purchaser, unless a contrary intention appears, and the vendor is regarded as holding the legal title in trust for the benefit of the purchaser, while the latter is regarded as the

trustee of the vendor for the unpaid purchase money; and anyone thereafter taking a conveyance of the land from the vendor, with the notice of the contract, takes it subject to the same equity in favor of the purchaser that controlled the title in the hands of the vendor: Waterman on Specific Performance, sec. 512 et seq.; 1 Tiffany on Real Property, sec. 110; Pomeroy on Specific Performance of Contracts, sec. 314. If the court's conclusions as to the respective rights and obligations of the parties under and in view of the contract were correct, the decree should have directed a conveyance by Mrs. McKenzie to the plaintiff, and as everything in this record indicates that the former had paid to Frank for her deed the same amount of money named as the price to be paid by plaintiff, and had become the owner of the property, subject only to the rights of the plaintiff under her alleged contract, the purchase price on deposit in the court should have been ordered paid to her. Or, to overcome any doubt on the subject, the court might have directed an inquiry [53] to ascertain which of the two parties, Frank or Mrs. McKenzie, was equitably entitled to the money. The decree as entered not only declared Mrs. McKenzie's deed void, but directed the money paid into court by the plaintiff to be paid to Frank, who, for all that the evidence discloses, had already received the same amount substantially from Mrs. McKenzie, when he conveyed to her.

The defendants tendered the issue of want of consideration and lack of mutuality in the contract sought to be specifically enforced, and the errors assigned depend largely upon the contention that the contract is not enforceable by specific performance, for the reason that it lacked both mutuality and consideration. The agreement relied on is expressed in the written contract as follows: "It is further agreed that the party of the second part shall have the right to purchase the above-described premises at any time before the expiration of said six months upon the payment of the sum of five thousand dollars, and the interest on the same at the rate of eight per cent during said time."

The older authorities declare the doctrine that as a prerequisite to specific performance there must exist both mutuality of obligation and remedy, and, as a general or fundamental rule, that doctrine seems still to be maintained; but in modern equity practice it has become very much narrowed in its application by the recognition of a number of so-called

exceptions, though the exceptions are so thoroughly established that it would seem more accurate to consider them as a part of, or a modification of, the doctrine itself. Where a contract is intended to bind both parties, or where it is of such form or nature that it contains mutual executory provisions—that is to say, where both parties have bound themselves or intended to bind themselves by reciprocal obligations, then no doubt the doctrine as to the requirement of mutuality applies; and in such a case, if for any reason one of the parties is not bound, he cannot compel performance by the other: 2 Warvelle on Vendors, 2d ed., sec. 739; Pomeroy on [54] Specific Performance of Contracts, sec. 169. But the doctrine is not applicable to contracts unilateral in form though bilateral in effect, such as bonds and similar obligations, for contracts of that description are constantly enforced: 2 Warvelle on Vendors, sec. 739. Nor does it apply to an optional contract for the purchase or sale of land that is founded upon a proper and sufficient consideration: Matthews Slate Co. v. New Empire Slate Co., 122 Fed. 972; Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394; Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; 1 Warvelle on Vendors, secs. 125, 126; Pomeroy on Specific Performance of Contracts, secs. 167-169, and notes. In Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394, the United States circuit court of appeals said: "When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed and pay the price. Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them." In Matthews Slate Co. v. New Empire Slate Co., 122 Fed. 972, it is said: "This court is of the opinion that if two persons enter into a contract in writing under seal, by which the one party, in consideration of one dollar, the payment of which is acknowledged, agrees to sell and convey to the other party within a specified time certain lands and premises, on payment by the other party of a specified consideration, such contract is valid and binding, and ought to be and may be specifically enforced. The seller has the right to fix his price, and covenant and agree that on receiving that price within a certain time he will convey the premises, and if within that time the

purchaser of the option tenders the money and demands the conveyance he is entitled to it. To hold otherwise is to destroy the efficacy of such contracts and agreements."

There is abundant authority sustaining the proposition that an agreement by one party to sell and convey land to [55] another for a stated price, if given upon a proper consideration, may be specifically enforced upon an acceptance and tender of the price within the time allowed by the contract; and it is not a valid objection in such case that prior to acceptance and tender no obligation rested upon the option holder to purchase. "And it is now well settled that an optional agreement to convey, or renew, a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it": Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; 21 Ency. of Law, 928; Waterman on Specific Performance, sec. 200; 1 Warvelle on Vendors, secs. 125, 126; Pomeroy on Specific Performance of Contracts, secs. 167-169; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580; Wilcox v. Cline, 70 Mich. 517, 38 N. W. 555; Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47, 8 South. 368, 11 L. R. A. 148; Hall v. Center, 40 Cal. 63. Waterman, in the section cited, states that it is doubtful if such an agreement should be called an exception to the general rule as to mutuality, since it is in fact a conditional contract, and when the condition has been made absolute by a compliance with its terms, the contract becomes mutual and capable of enforcement by either party: See, also, 2 Warvelle on Vendors, sec. 739.

Such an agreement, that is, an optional agreement to convey made upon proper consideration, or forming part of a lease or other contract that is in fact the consideration for it, cannot be revoked by the vendor within the period granted for the exercise of the option: Authorities, supra. But a mere proposal without consideration creates no obligation unless accepted according to its terms, and it may, therefore, be withdrawn at any time before acceptance; though if such an offer is allowed to remain open until accepted, it will become a binding contract. When the option given upon a consideration is accepted within the time allowed, and according to its terms, the offer and acceptance constitute a contract of sale, and the same result [56] flows from the acceptance of an

offer without consideration, if accepted before the offer is withdrawn or revoked: 1 Warvelle on Vendors, secs. 125, 126. An agreement in a lease granting the lessee the privilege of purchasing the premises within a stated period upon specified terms is regarded as a continuing offer to sell which may not be revoked during the period within which the agreement permits the option to be exercised: 1 Warvelle on Vendors, secs. 125, 126. In such case where no other consideration is stated or shown, the lease itself, with the affirmative covenants of the lessee, is usually considered as a sufficient consideration for the agreement to sell and convey at the lessee's option.

Now, in the case at bar the optional agreement does not recite a consideration, but it is contained in a written contract signed by the parties, and it is maintained on the part of defendants in error that the contract being a lease of the premises constituted a sufficient consideration for the agreement to convey, and it seems to be relied on as the sole consideration. On the other hand, it is contended that the contract never took effect or became operative as a lease or for any other purpose, for the reason that the plaintiff neglected to perform a condition precedent to its operation, viz., the agreement to deposit five hundred dollars as security for her faithful performance of the lease, and the payment of the taxes. Hence it is insisted that the paper did not amount to a lease, and could not, therefore, be regarded as a proper consideration for the optional agreement; and that the lessor, Frank, revoked the agreement by the sale and conveyance of the premises to his codefendant, Mrs. McKenzie, which fact was brought to the knowledge of the plaintiff shortly thereafter, and before any acceptance on her part of the privilege of purchase.

It becomes important, therefore, to consider the character of the agreement to make the deposit, and whether the failure to do so rendered the lease ineffective. There is no dispute upon the facts as to the deposit. It was neither made nor offered at any time, but, on the contrary, the [57] plaintiff stated, after her eviction and when her attention was called to her neglect to comply with her agreement to secure her performance of the terms of the lease by making a deposit of five hundred dollars, that she repudiated that part of the contract.

Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs; such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties as collected from the whole contract, whatever the order in which they are found, or the manner in which they are expressed, although certain words are customary when a condition rather than a covenant is intended. But it seems that the same words may be employed to create either a covenant or a condition.

The words employed in the beginning of the instrument are words of present demise. It reads: "This article of agreement made and entered into this fourth day of April, 1901, by and between Abe Frank, party of the first part, and S. Henrietta Carlile-Kent, party of the second part, witnesseth: That the party of the first part has this day leased to the party of the second part the following described lands (description) for a term of six months from April 1, 1901, and the party of the second part agrees to pay as rental of said premises the taxes on the same for the current year 1901." Then follows the clause giving the privilege of purchase, and following that are the other agreements as to the use of the premises, and the instrument then concludes with the agreement for the deposit that is quoted in an earlier part of this opinion.

The deposit was required for a specified purpose, viz., to secure the faithful performance by plaintiff, the lessee, [58] of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be the taxes for the year, and a certain portion of the crops, should she not exercise the option of purchase. Now, we know, as the parties doubtless also knew, that the taxes would not become due or payable until a very short time before the expiration of the lease The statutes require the tax list to go into the hands of the collector by the third

Monday of September; and the taxes would not become delinquent until the last day of December. Indeed, the amount of the taxes could not have been ascertained until September. Here, then, is to be perceived a substantial reason for the requirement of security in advance. A reason is also to be found in the nature of the covenants of the plaintiff respecting the use to be made of certain parts of the premises, as well as to the keeping of the improvements in repair. This would all indicate that the agreement for the security was intended as a condition rather than a mere covenant. Moreover, as a covenant it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefits. As no time for making the deposit was stated, doubtless a reasonable time would be implied, and had the lessee been out of possession, a tender of the security and demand for possession within a reasonable time might no doubt have entitled her to possession under the lease. But no such question arises here. [59] It was clearly proven, and so found by the court, that she was in possession at and prior to the making of the contract. There is nothing in the evidence to show that Frank did any act toward placing her in possession; nor is the title or right under which she had been in possession disclosed, except, perhaps, it may be inferred from a circumstance to which we shall have occasion to refer. There is no question of waiver of the condition which we are permitted to consider. The pleadings set out a full compliance with all conditions; and the judgment of the court was based upon a finding that they had been substantially complied with. The reply, indeed, alleges that Frank did not demand the deposit; but he was not required to do so. There is no showing, however, as to that averment. The evidence is silent as to whether or not such a demand was made. But when the plaintiff was charged with failing to furnish the security, she responded by saying that she repudiated that agreement. It is not disclosed, moreover,

that Frank did anything toward recognizing the possession of the plaintiff, after the making of the contract, or that he did any act in relation to the property, except to sell and convey it to Mrs. McKenzie on April 17th. And after that the record is silent concerning him until his refusal of the tender of the purchase price, September 20th, except that he appears to have been present at the interview between the plaintiff and Mrs. McKenzie, and their attorneys, after plaintiff had been evicted from the premises. But we think the question of waiver is not the case now before us. The trial court made no finding in that respect, and such an issue is not presented by the pleadings. The above facts have been adverted to for the purpose of showing that nothing appears even by the subsequent conduct of Frank to indicate an intention to treat the agreement for security as anything other than a condition precedent to any right of the plaintiff to the premises under the lease.

Similar provisions have, so far as we have been able to discover, been held to amount to conditions precedent. In 60 the English case of John v. Jenkins, 1 Car. & M. (Ex.) 227; the lease there before the court contained words of present demise: "He, the said Esau Jenkins lets this farm to David Jones," etc. But the following clause was contained in it: "David Jones is to give two sureties to answer for the rent." The court said that the provision as to sureties was very important, and showed that the instrument was never intended to operate as a lease at all events, but to operate as an agreement only; and that it was not to so operate except security should be given for the rent by two sureties on the part of plaintiff. And as no sureties were given the instrument was, for that reason, as well as others unnecessary to mention, held to be without effect, and the plaintiff's possession was held to have been under the terms of a previous tenancy. In that case the plaintiff was in possession as tenant under a former agreement when the one in controversy was entered into.

In McGaunten v. Wilbur, 1 Cow. 257, a house was hired on October 31st, for six months from the first day of November following, for which the hirer agreed to pay one hundred and fifty dollars; fifty dollars to be paid in advance, and the residue to be secured by a bill of sale of his furniture in the nature of a mortgage. At the time of the hiring the hirer mentioned that he would not want possession for a fortnight. On the 3d of November the owner of the house, not having received

the advance payment or security, rented it to another tenant. A few days later the first party tendered the fifty dollars and bill of sale and demanded possession. It was held that as the tenancy under the agreement was to commence November 1st, and the advance payment had not been made on that day, nor the security given, the owner had the right to consider the contract at an end, and let his house to any other person. To the same effect are the following cases: Andis v. Personett, 108 Ind. 202, 9 N. E. 101; Hard v. Brown, 18 Vt. 87. See, also, Cassity v. Robinson, 8 B. Mon. 279; Stainton's Admr. v. Brown, 6 Dana (Ky.), 248; Burlington etc. R. R. Co. v. Boestler, 15 Iowa, 555.

[61] It is impossible, therefore, to construe the provisions in question as anything other than a condition precedent, and hence until performed the instrument was only an agreement for a lease, but, not having been performed, the lease did not become effective, or binding upon the owner of the premises, and cannot be regarded as constituting a consideration for the optional agreement to convey. There is nothing in the fact of plaintiff's possession to change the situation. She was in possession at and before the signing of the contract, and there is no proof that Frank delivered possession to her. It is not perceived, therefore, upon what ground such possession can be regarded as imparting vitality to the lease. In the absence of any other showing, she would be but a mere tenant by sufferance: Rev. Stats., sec. 2772. The taking and keeping possession by the plaintiff, without more, was clearly not a part performance of the contract on her part. Possession is what she contracted to receive, not to give, and there is no opportunity or foundation in this case upon the record for the application of the principle that when a party has voluntarily accepted the benefits of part performance, he may be precluded from insisting upon the performance of the residue as a condition precedent to his liability to pay for what he has received. No doubt had the lessor put the lessee in possession, that act might have indicated an intention not to treat the agreement for security as a condition precedent; and possibly the same intention might have been gathered from affirmative acts of the lessor in recognition of the possession and an existing tenancy under the contract. But there is no evidence of such acts on Frank's part. The evidence does disclose a notice served upon the plaintiff in the early part of July by Mrs. McKenzie which seems to rec-

ognize in a way that plaintiff was holding under the lease, but asserted that she had not complied with its terms, and that the giver of the notes reserved the right to declare the lease forfeited. But Mrs. McKenzie was not a party to the contract, and we do not understand that she could by recognizing [62] the lease at that time and in that manner render it effective so as to make the obligation to convey binding upon Frank, her vendor. There is nothing to show that the latter advised or consented to the notice or knew of it, and hence it can hardly be deemed persuasive of an intention on his part, or of the parties to the contract, to consider the contract as a present demise and the provision as to security as a mere covenant.

We are constrained, therefore, to hold that the finding of substantial compliance with the terms of the contract is not sustained by the evidence. No doubt the contract was valid so far as effective, and the agreement to convey upon payment of the specified price, although without consideration, obligated Frank to make the conveyance had there been an acceptance and tender before a revocation on his part. But as his promise was, so far as the record discloses, without consideration, it was his privilege to revoke it at any time previous to acceptance. And the sale and conveyance of the property to Mrs. McKenzie, which does not appear to have been otherwise than in good faith and for a valuable consideration, and which was brought to the knowledge of the plaintiff before any attempted acceptance of the option, amounted to a sufficient revocation: Dickinson v. Dodds, 2 Ch. D. 463; Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; Little v. Thurston, 58 Me. 86; Warren v. Richmond, 53 Ill. 52.

There was no apparent attempt on the trial to show, nor is it now suggested, that the optional agreement was based upon any other consideration than the lease. There is a fact disclosed by the evidence that seems to point to the probability of an executed consideration independent of the lease. The plaintiff introduced in evidence a warranty deed of the same date as the contract in question, whereby it appears that the plaintiff conveyed the identical premises to the defendant Frank, in which the consideration is stated to be five thousand dollars, and it is shown that plaintiff had before that date been in possession of the property. [63] But the deed is not

in any way explained, nor is there any proof that it formed a part of the transaction out of which grew the optional agreement. Had the agreement of Frank to subsequently convey the premises to plaintiff at her option been made in consideration of her conveying the property to him, and as a part of the same transaction, we are inclined to think that it would have been competent for plaintiff to have shown that fact, and that it might have rendered the optional agreement binding for the period in which the option was permitted to be exercised, notwithstanding that no right of possession was acquired under the lease because of the failure to furnish the required security. It is true that in her testimony plaintiff speaks of her right to "repurchase" the property. But there was no attempt to show that she obtained or contracted for that right at the time she executed her deed or as a part of that transaction. Counsel for plaintiff asked her when she was on the witness-stand to state the conversation between herself and Frank at the time she "signed this deed," and, upon objection being interposed, counsel stated that the proof was offered particularly in support of the second cause of action to show that Frank did not intend to comply with his agreement, and to show malice and wrongful acts on the part of both defendants. The objection was sustained and the proof offered excluded. The deed and the conversation at the time, therefore, do not seem to have been offered as proof of consideration for the optional agreement. And as the deed and contract were not connected by the evidence, we are not at liberty to supply the omission by inference, if indeed there was any omission. It is not our privilege to assume that they were related. It may be that the agreement sought to be enforced was an afterthought, and entered into after the transaction resulting in the conveyance of the property to Frank had been entirely closed. There is nothing in the findings of the trial court to indicate that any reliance was placed upon the deed.

[64] It follows from our conclusions as to the contract relied on under the pleadings and evidence that the district court erroneously found it to be obligatory upon the vendor Frank, during its term, and to be binding upon him to convey the property upon the tender by plaintiff of the purchase price, in September, when the tender was made. As the cause must be remanded for new trial, it will be proper for us to say that we do not coincide with the contention of counsel for plain-

tiffs in error that the tender was made to the wrong party, assuming that the agreement to convey was then in force Mrs. McKenzie was not a party to the contract. Frank's conveyance to her would not have released him from his obligations to perform the contract had it been incapable of revocation on his part. The doctrine of specific performance of contracts for the sale and purchase of land is said to mainly depend upon the principle of the transmission by the contract of an equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee; and a subsequent purchaser from the vendor with notice of the previous contract stands, in equity, in the place of his vendor, and is as much a trustee as he was; and, therefore, he may be compelled to specifically perform his vendor's contract by conveying the legal title to the first purchaser: Waterman on Specific Performance of Contracts, sec. 512. The object of the tender was to exercise the claimed option within the time limited, and to show an acceptance of the option according to its terms ; and, under the circumstances of this case, had the option been a subsisting one, we are of the opinion that the tender was properly made to Frank, who had entered into the covenant to convey; and thereupon both Frank and his grantee, Mrs. McKenzie, would have become bound to make the conveyance: Sizer v. Clark, 116 Wis. 534, 93 N. W. 539.

It further follows that the court erroneously awarded the plaintiff damages for the withholding of possession from her from the time of her eviction up to the date of [65] the decree. Not having performed the condition precedent to her right of possession under the lease, she could not lawfully retain it. Even had there been shown an independent consideration for the agreement to convey, she would not have been entitled to possession in consequence merely of such an option in the absence of an express stipulation to that effect, until at least she had made the tender and demanded a deed: 2 Warvelle on Vendors, 2d ed., secs. 891, 958. It is evident that the damages were awarded upon the second cause of action on the theory that both defendants had wrongfully and maliciously dispossessed the plaintiff and used and occupied the premises. Upon that theory, as already indicated, we think it doubtful if there was a sufficient showing to hold Frank accountable for the acts of his codefendant. But, as the case must go back upon other grounds, it is not necessary to express a decided opinion upon that question; and for obvious

reasons it is not necessary to consider whether, had the optional contract been shown to be binding and incapable of revocation by the vendor during its term, Frank would have been liable in damages for plaintiff's loss of possession after the tender, upon the theory that after tender she became, in equity, the owner and thereafter entitled to possession, of the rents and profits, and that a court of equity, in order to adjust the rights of the parties in furtherance of justice, might, in an action for specific performance, award damages for deprivation of possession: See 2 Warvelle on Vendors, sec. 958; Waterman on Specific Performance of Contracts, sec. 519; Worrall v. Munn, 38 N. Y. 137; Cole v. Tyson, 8 Ired. Eq. 170.

For the reasons stated the judgment will be reversed, and the cause remanded for new trial.

Corn, C. J., and Knight, J., concur.

Specific Performance of contracts in the absence of mutuality of obligation and remedy is considered in Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758; South etc. R. R. Co. v. Highland etc. R. R. Co., 98 Ala. 400, 39 Am. St. Rep. 74; Warren v. Castello, 109 Mo. 338, 32 Am. St. Rep. 669; Hickey v. Dole, 66 N. H. 336, 49 Am. St. Rep. 614.

A Vendee of One Who has Agreed to Convey Land may, unless he is a purchaser in good faith and without notice, be compelled to perform the contract of his vendor: Ross v. Parks, 98 Ala. 153, 30 Am. St. Rep. 47.

An Option to Purchase Land, given without consideration, may be withdrawn at any time before acceptance, upon giving notice to the other party, but an option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired, and if such consideration is not paid at the date of the option, but at a later date and during the life of the contract, it may be specifically enforced: Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881, and cases cited in the cross-reference note thereto.

The Rent Reserved in a Lease is a Sufficient Consideration for an agreement by the landlord therein to convey the property to the tenant upon the expiration of the term and the payment of the agreed purchase price: Gustin v. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361.

Conditions Precedent in deeds and wills are discussed in the monographic note to Brennan v. Brennan, 102 Am. St. Rep. 366-370. And what words create a condition subsequent are discussed in the extended note to Eeroyd v. Coggershall, 79 Am. St. Rep. 747-769.

HECHT v. CAREY.

[13 Wyo. 154, 78 Pac. 705.]

EXECUTOR.—A Nonresident of the State in which a will is admitted to probate may, in the absence of a controlling statute, qualify and act as executor. (p. 982.)

EXECUTOR.—A Nonresident may be Appointed as executor, under the statutes of Utah, provided he is a resident and citizen of the United States. (p. 982.)

EXECUTOR—Nonresident—Suspension for Removing from State.—A nonresident executor who continues his nonresidence, but nevertheless comes into the state to attend to the business of his executorship, cannot be suspended or removed solely on the statutory ground that he "has permanently removed from the state." (pp. 984, 985.)

EXECUTOR—Removal by Supreme Court.—The supreme court of Wyoming has no original jurisdiction in the matter of the removal or suspension of executors; its jurisdiction is purely appellate. (p. 985.)

W. R. Stoll, for the plaintiff in error.

H. Donzelman, amicus curiae.

159 CORN, J. Charles Hecht and John F. Carey, respectively plaintiff and defendant in error, were named as executors of the will 160 of Julia F. Schweickert. Subsequently to her death the will was probated and they were duly appointed and qualified as such executors. Afterward, on April 27, 1903, the court made the following order: "It having come to the knowledge of the court by the testimony of Charles Hecht, one of the executors of the above-named estate, which testimony was heretofore given under oath at a hearing in which the question of the confirmation of a sale of property made by the executors of said estate, was under consideration, that said Charles Hecht is not a resident of the state of Wyoming, but is now present by counsel, it is now and here ordered, under the provisions of section 4622 of the Revised Statutes of Wyoming of 1899, that the powers of the said Charles Hecht as such executor be suspended until the twenty-ninth day of April, A. D. 1903, at the hour of 10 o'clock A. M., at which time the question of the removal of said Charles Hecht as such executor will be heard and considered by the court." And, on April 29th, the court made the following order: "It having come to the knowledge of the court by the testimony of Charles Hecht, one of the executors of the above-named estate, and who was nominated as such executor by

the will of the said Julia F. Schweickert, deceased, which testimony was heretofore given under oath at a hearing in which the question of the confirmation of a sale of property made by the executors of said estate was under consideration, that said Charles Hecht is not a resident of the state of Wyoming, and the court having thereafter, on the twenty-seventh day of April, A. D. 1903, made an order suspending the said Charles Hecht as executor of said estate, and setting the matter for a final hearing on the twenty-ninth day of April, A. D. 1903, at which time the said Charles Hecht was present in court, and the matter came on to be heard upon the record and papers on file in the matter, and no evidence other than such record and papers on file being introduced, and it being admitted by the said Charles Hecht, and it appearing to the court that the said Charles Hecht is a nonresident of the state of Wyoming, [161] and has been such nonresident ever since a time prior to the date of his appointment as such executor, and the matter being fully argued by counsel, and the court being fully advised in the premises, it is ordered that said Charles Hecht be and he is forthwith removed as executor of the estate of the said Julia F. Schweickert, deceased, expressly upon the ground and for the reason that he is a nonresident of the state of Wyoming, to all of which the said Charles Hecht, by his attorney, now and here excepts."

Section 4622 of the Revised Statutes above referred to, provides for the suspension of the powers of the executor when, among other causes, the judge has reason to believe that such executor "has permanently removed from the state." And section 4623 provides that if upon the hearing the court "is satisfied that there exists cause for his removal, his letters must be revoked." Plaintiff in error alleges that the orders suspending and removing him were erroneous.

There can be no question that, under the general rule, and independent of statute, a nonresident of the state in which the will is admitted to probate may qualify and act as executor: 11 Am. & Eng. Ency. of Law, 753, and authorities cited. Our statute (section 4570) clearly authorizes the appointment of a nonresident as executor, provided he is a resident and citizen of the United States. Moreover, while section 4637 expressly declares that no person is competent to serve as administrator who is not a bona fide resident of this state, section 4628, in detailing the disqualifications which

debar a person from serving as executor, significantly omits the fact of nonresidence from the enumeration. It being the law of this state, then, that a nonresident may qualify and serve as an executor, is it competent for the court, by virture of section 4622, providing for his suspension when he "has permanently removed from the state," to suspend or remove an executor who was a nonresident when letters testamentary were issued to him, upon the sole ground of his continued nonresidence? Very clearly, we think, it is not, and that the statute does not require or permit such a construction.

[162] In the first place, the expression itself, that he has "removed," does not fairly cover the case in question, but seems to imply the necessity of some change in the status of his residence since his appointment. And, in the second place, such an interpretation involves consequences which are absurd. As said in New York, in construing provisions similar to ours: "If section 2685 covers cases of nonresidence which existed at the time of the grant of letters, this result follows: That, though in the absence of objection, a nonresident has an absolute right to letters even without giving a bond, and though he has that right, even in the face of objection, upon furnishing such bond, the letters must as soon as granted be taken away if any person interested in the estate demands it. An interpretation which involves such absurd consequences should certainly be avoided, if the language to be interpreted is capable of some other sensible construction": Postly v. Cheyne, 4 Demarest, 492. Under such a construction, the absurdity is even more glaring in this state, for not only has the nonresident an absolute right to letters under section 4570, but by section 4622 whenever the judge "has reason to believe, from his own knowledge or from credible information," that the executor has removed from the state, "he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated," and it is not necessary that anyone should have demanded such suspension. So that it might readily occur that the judge, knowing in advance that the applicant was a nonresident, would find himself bound to issue the letters and immediately afterward, upon his own motion, to suspend the executor's powers as a step toward his removal. Such a construction ought not to be adopted unless the language imperatively demands it, which, as we have already seen, it clearly does not.

These provisions of our code were adopted from that of California, and we think the view taken of the matter by the supreme court of that state is the reasonable one. A [163] nonresident may be appointed and act as executor in this state, but he must come here within a reasonable time and personally submit himself to the jurisdiction of the court and personally conduct the settlement of the estate: In re Brown, 80 Cal. 381, 22 Pac. 233. They further hold, however, and we think reasonably, that while the phrase "has permanently removed from the state" may more properly refer to a resident executor who has permanently removed from the state, the reason for revoking the letters in such case applies equally to a nonresident executor who comes here to receive his appointment and then permanently withdraws from the state and remains away. It is his permanent absence from the place where the business is to be transacted, beyond the process of the court and where the creditors of the estate and others having business with it cannot reach him, that creates the disqualification, and this is equally true of both resident and nonresident executors. The California court disclaim any intention to destroy, by construction, the right of a testator to name a nonresident as his executor, but say that the statute should be so construed as to give ground of removal of a nonresident exectuor when he fails to come to this state and personally conduct the business of the estate at such times and as frequently as the interests of the estate and of those concerned in its settlement may require: Estate of Kelly, 122 Cal. 379, 55 Pac. 136.

In the case under consideration, however, it is not only recited in the order that the plaintiff in error was removed expressly upon the ground and for the reason of his nonresidence, and that no other evidence was introduced upon the hearing than the record and papers on file in the matter, but it is also recited that he was present in court at the hearing, and it appears from the papers in the case filed in this court that, within a month of his suspension, he was personally present in the state and attending to the business of the executorship. Indeed, he seems to have participated personally in the last business of the estate prior to the [164] suspension, so far as is shown by the papers in the case. It is apparent, therefore, that he had not permanently removed from the state in the sense of having permanently absented himself from the place where the business was to be transacted or

withdrawn himself beyond the process of the court. We are of the opinion, therefore, that the orders suspending and removing the plaintiff in error from his executorship were erroneous and without authority of law.

But counsel for defendant in error alleges in his brief that a hearing was had on the petition of one Sophia Pickard praying that the inventory and appraisement filed by the executors be set aside and that the order of the court confirming the sale of certain real estate be vacated; and that evidence was taken on this and other hearings in the course of the administration which, if before this court, would show such misconduct as executor upon the part of plaintiff in error as made it the duty of the court under the law to suspend his powers. That, therefore, even if it should be found that the cause of removal stated in the order was not sufficient, or was not the real cause upon which the court acted, this court ought not to set aside such order. And counsel has filed a motion "for an order to the clerk of the district court directing said clerk to send up a full transcript of the record and the testimony taken in this case."

But it must be borne in mind that this court has no original jurisdiction in the matter, but its jurisdiction is purely appellate. Under the statute in the case of charges against an executor, he must be cited to appear and show cause why he should not be removed. He may answer or demur, and the issue thus raised must be determined by the court or judge. By the express terms of the order of removal in this case, the only issue heard or determined was the question of his nonresidence. No issue involving misconduct upon his part was determined by the court below. So that, if evidence upon that question was received by the district court and if it were before us, it would be entirely irrelevant and immaterial as affecting the controversy in [165] this court, for the reason that we are without jurisdiction or authority to go into the lower court and remove the executor for misconduct, and no such judgment or determination of that court is before us by any proceeding in error. It does not affect the question that this court is empowered by statute in certain cases to render such judgment as the court below should have rendered. It can only do so when the issue has first been heard and determined in the inferior court and is before this court upon proper proceedings in error.

It is also urged that all the evidence taken in the court below not being before this court, the judgment of the lower court ought not to be disturbed. But it is sufficient to say that no question of the weight or sufficiency of evidence is involved in the proceedings in this court. The order itself recites that it was admitted upon the hearing that plaintiff in error was a nonresident of the state and had been ever since a time prior to the date of his appointment. There is no exception or objection to that finding and he was removed solely upon that ground. No amount of evidence would tend to illuminate the proposition. It is purely a question of law.

The several orders of the court below suspending the powers of the plaintiff in error as executor and removing him from his executorship will be set aside and reversed.

Potter, J., concurs.

At the Common Law, all Persons except idiots and lunatics, were competent to act as executors; neither infancy, nonresidence, coverture, improvidence, ignorance, nor moral delinquency disqualified one for the office: Kidd v. Bates, 120 Ala. 79, 74 Am. St. Rep. 17. And if the person named in a will does not come within either of the classes of persons declared by statute to be incompetent, it is the duty of the court to issue letters testamentary to him (Clark v. Patterson, 214 Ill. 533, 105 Am. St. Rep. 127), unless he renounces his right to letters or fails to apply for them as required by law: Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828. Although a nonresident is not disqualified to act as administrator, still if he delays in applying for letters, the court may appoint another person to the office: Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828.

JOHNSTON v. LITTLE HORSE CREEK IRRIGATING COMPANY.

[13 Wyo. 208, 70 Pac. 22.]

WATER RIGHTS—Sale of Water.—An appropriator of water for irrigation cannot sell surplus water which he does not need; all that he can sell is his water right. (p. 992.)

WATER RIGHTS—Property Rights Therein.—The right to use the water of a stream, based upon a prior appropriation thereof for beneficial purposes, is a property right, and as such is susceptible of transfer. (p. 992.)

WATER RIGHTS—Sale Separate from Land.—A water right may be sold separate from the land, provided other appropriators are not injuriously affected thereby—that is, provided the burden upon the use is not enlarged beyond that which rested on it in the hands of the original appropriator as he was entitled to and did use it. (pp. 992, 993.)

WATER RIGHTS.—The Only Property in the Water owned by an appropriator is a right to use it as measured by his appropriation. (p. 993.)

WATER RIGHTS—Sale Separate from Land.—In the Statutes of Wyoming there is no express or implied prohibition against the sale of a water right separate from the land to which it is appurtenant. (pp. 993, 994.)

WATER RIGHTS—Effect of Their Sale.—When a water right is sold separate from the land, it does not become a mere floating right. It becomes appurtenant to other land, if it is intended by the grantee for irrigation, or else is devoted to other equally beneficial uses. Without some beneficial use after the sale, it will be held abandoned, as in the case of an original appropriator who intentionally ceases to use it. (p. 997.)

WATER RIGHTS—Change of Place of Diversion.—There is nothing in the law of prior appropriation that prevents a change of the place of diversion, if it can be accomplished without injury to others. (p. 1000.)

WATER RIGHTS—Use During Alternate Weeks by Co-owners. An agreement in a deed of an undivided interest in a water right, providing for the use of all the water by the grantor and grantee on alternate weeks respectively, is not in itself objectionable. (p. 1000.)

WATER RIGHTS—Effect of Transfer of Undivided Interest.—Upon the sale of an undivided one-half interest in a water right, the grantor and grantee stand in relation to each other the same as if they originally had made a joint appropriation. (p. 1001.)

Van Orsdel & Burdick and Platt Rogers, for the plaintiffs in error.

Gibson Clark and John W. Lacey, for the defendant in error.

222 POTTER, J. This is a proceeding in error complaining of a final decree entered by the district court, in and for Laramie county, perpetually enjoining the defendants below, plaintiffs in error here, from any interference with the plaintiff below, defendant in error here, in the use and enjoyment of an undivided one-half interest in and to ten (10) cubic feet of water per second of time of the waters flowing in Little Horse creek; the said ten cubic feet of water being the amount awarded to the Spring Vale Ditch Company by decree of the state board of control, rendered May 7, 1891, as of priority number eight (8) on said stream, and said undivided one-half interest having been conveyed October 30, 1894, by deed by said Spring Vale Ditch Company to said defendant in error; and the said final decree here complained of also enjoined the plaintiff in error from interfering with the use by defendant in error of the channel of said creek for the purpose of conveying the water aforesaid down

to the headgate of the ditch of defendant in error, and its diverting the same into its ditch.

The suit was instituted by the defendant in error against James R. Johnston, Lizzie D. Johnston, George D. Johnston and Harry Homer Johnston, and George W. Snow, as water commissioner. During the pendency of the cause in the court below James R. Johnston died, and, in his stead, Lizzie D. Johnston and George D. Johnston, as executors, and Harry Homer Johnston, as heir at law, were substituted as defendants. Notwithstanding such substitution, the petition in error herein was prosecuted in the names of the original parties, the name of James R. Johnston having been inadvertently used as one of the plaintiffs in error. This error is called to our attention by counsel for defendant in error in their brief, and it is urged that, as the interest of the defendants below was joint, the proceeding in error is improperly prosecuted. Counsel for plaintiffs in error, however, have filed a motion to strike the name of the deceased party from the title; and exhibit a decree of the [223] district court, in probate, dated July 21, 1898, some months prior to the decree in the case at bar, whereby it appears that Lizzie D. Johnston was declared and decreed to be the sole legatee under the last will and testament of the deceased; that all the property of the estate be vested in her; that she was then in possession thereof; that the estate had been fully administered, and the executors were thereby discharged. Hence, it appears that said Lizzie D. Johnston, who was one of the defendants below in her own right, as well as executrix, and is a plaintiff in error herein, has succeeded to all the rights of James R. Johnston, deceased, and in fact had so succeeded prior to the entering of the decree complained of. It seems that no injustice can follow the granting of the motion, since all the parties interested are herein named as parties; and, therefore, the motion will be granted, and the names of James R. Johnston will be stricken from the title of the case as one of the plaintiffs in error.

Primarily, the respective rights of the contesting parties to the water in controversy is based upon a decree of the state board of control adjudicating the priorities on the stream in question. By that decree the Spring Vale Ditch Company was awarded priority No. 8 for ten cubic feet of water per second of time, for the irrigation of seven hundred acres

of land; the plaintiffs in error were awarded priority No. 9, for seven and seventy-one hundredths cubic feet, to irrigate five hundred and forty acres of land; and the defendant in error priority No. 10, for seventeen and fourteen hundredths cubic feet, for the irrigation of twelve hundred acres of land. The ditches of the owners of the three priorities above named relatively connect with the stream about as follows: The headgate of the Johnston ditch is located near the head of the stream; the headgate of the ditch of the Spring Vale Ditch Company, two and one-half miles below the headgate of the Johnston ditch; and the ditch of defendant in error has its headgate two and one-half miles below the headgate of the Spring Vale ditch.

The appropriations under which the parties named obtained their respective priorities were made prior to statehood and before the adoption of our constitution and the [224] creation of the state board of control. Proceedings were pending at the time of the adoption of the constitution in one of the district courts of the state, for the determination of the various priorities upon the stream in question. And, following the enactment of the law by the first state legislature with reference to the adjudication of water rights by the board of control, the said proceedings, by virtue of one of the provisions of that act, were transferred to the board of control, by whom the final decree of adjudication was rendered. On October 30, 1894, the Spring Vale Ditch Company made and executed its deed to the Little Horse Creek Irrigating Company, the defendant in error here, whereby it conveyed to said defendant in error an undivided one-half of the interests of the grantor in and to the waters of Little Horse creek that had been adjudged to said grantor by the board of control; and it was recited in said deed that "The said waters hereby conveyed and the use thereof being intended to be wholly severed from the lands of the party of the first part or any other person and from use thereon; it being the intention of the said party of the first part to convey to the said party of the second part an undivided one-half in and to all the rights which it may have acquired to the use of the waters of said Little Horse creek, as involved within the adjudication aforesaid; and to convey the same to the said party of the second part as fully and entirely as it may lawfully do, and to convey to the said party of the second part the unrestricted

use thereof by the party of the second part in the irrigation of lands at such point or points as he may elect to use the same."

It was expressly agreed by and between the parties to said instrument, by provision therein inserted, that the said parties, beginning on the first day of March in each year, should use the waters that had been adjudged to the grantor as follows: The party of the first part, viz., the Spring Vale Ditch Company, shall be permitted to use all the waters for the term of one week. At the expiration of that time the second party, the Little Horse Creek Irrigating [225] Company, shall be authorized to use all the waters so adjudged for the period of one week; and so alternately the said waters shall be used by the parties respectively, each using all the waters one week at a time, and no longer, during all of the irrigating season of each and every year, and so long as said parties or either of them shall desire to use the said water in any year. The evidence discloses that after the execution and delivery of this conveyance, the waters that had been appropriated by the Spring Vale Ditch Company were used in the manner set forth in said deed; the defendant in error diverting the waters for its use into its ditch located about two and one-half miles below the ditch of the Spring Vale Ditch Company, and the latter company diverting the water when it used it into its own ditch, by means of which the original appropriation had been effected. It appears that the plaintiffs in error, considering the sale of an interest in said water right to be invalid and to confer no right or title upon the grantee, and that it amounted to an abandonment on the part of the Spring Vale Ditch Company of one-half of its original appropriation, sought and claimed the right to use the same as the next succeeding appropriator. And it is contended on behalf of plaintiffs in error that a sale of a water right separate from the land for the irrigation of which the water was appropriated is not permitted under the laws of this state. This raises the important question in the case.

In Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025, it was held that a water right acquired for the irrigation of lands is an appurtenant to the land and passes with a conveyance of the realty, without being specifically mentioned, but it was said by Mr. Justice Conaway, who delivered the opinion in that case: "It is true that by all the authorities the water right is separable from the land to which it is appurtenant and may

be sold separate from the land, and the place of diversion and the place of use may be changed. But this is only when these acts are not injurious to the rights of others." And in the case of McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773, the same [226] learned justice said: "As held in the case of Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025, decided at the present term, a right to the use of water for purposes of irrigation, together with the ditch or other conduit for the water, may be conveyed separate from the land upon which the water is used. It seems that this is what has been done with the water right involved in this case."

We are aware that, notwithstanding the expressions and decisions in the cases above mentioned, which decisions were rendered in 1894, prior to the execution of the deed in question, there has existed in the minds of the administrative officers of the state, charged with the execution of the laws governing the appropriation and distribution of water, an opinion that, by reason of some provisions of our statutes unlike the statutory provisions prevailing in most of the other arid states, water appropriated for the irrigation of land becomes not only appurtenant thereto, but inseparably connected therewith, and, therefore, incapable of transfer or conveyance separate from the land; and the opinion, we understand, has prevailed among such officers that in the cases aforesaid the effect of our peculiar statutory provisions was not considered.

In view of the fact that such decisions were rendered before the conveyance in question, and that the parties presumably relied thereon in granting and receiving the conveyance, the law ought to be found very clear to justify the court at this time in overruling them, and holding the transfer void.

It is not denied, nor can it be, that it has uniformly been held in this country, wherever the doctrine of prior appropriation is recognized, that a water right obtained by and for the irrigation of land may be sold separate therefrom: Gould on Waters, sec. 234; Kinney on Irrigation, secs. 264, 265, and cases cited; Long on Irrigation, sec. 79; 3 Farnham on Water and Water Rights, secs. 643, 679. Mr. Farnham says in section 679 of his work above cited: "The right acquired by an appropriation of water being a property [227] right, it is subject to transfer, the same as any other species of property; and this transfer may be separate from the land upon which it was intended to be used. And this sale

may include all of the right to which the vendor is entitled, or it may be limited to a portion of it." And in section 643, the same author says: "But there is no reason why it should remain attached to the land in connection with which it was first used, and, therefore, the rule is that it may be sold separate from the land."

As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he cannot sell surplus water which he does not need while retaining his original appropriation; and it has been held that as against a subsequent appropriator, a senior appropriator cannot give the water he does not use to another for a certain period who otherwise would have no right to use it: Manning v. Fife, 17 Utah, 232, 54 Pac. 111. So far as we are informed, however, every case in which that or a similar principle has been decided admits that the water right may be sold and conveyed separate from the land, provided that other appropriators are not injuriously affected by such sale.

An individual appropriator of water for irrigation secures no surplus water, hence he has no surplus which he can either sell or give to another as against subsequent appropriations. His appropriation, and therefore his water right dependent thereon, is at all times limited, within the maximum of his appropriation, to the quantity capable of beneficial use and actually so used. If during any period he does not require the use of the water it falls during that period to the subsequent appropriator who does need the same and can beneficially use it. What the appropriator may sell is his water right; that is all he has to sell. That is all that would pass by deed of the land as an appurtenance. The water in the stream is not his property; but his right to use that water based upon his prior appropriation for beneficial purposes is a property right, and as such is [228] capable of transfer. The only limitation upon the right of sale of a water right separate from the land to which it was first applied, and to which it has become appurtenant, laid down by any of the authorities, is, that it shall not injuriously affect the rights of other appropriators. In other words, the burden upon the use must not be enlarged beyond that which rested upon it under the original appropriation and while in the hands of the original appropriator as he was entitled to and did use it. This principle is the necessary result of the fact that the only

property in the water owned by the appropriator is a right to use it as measured by his appropriation.

But it is insisted that, under the statutes of this state concerning the acquisition of water rights, an entirely different rule must prevail. It is not contended that there is any statute expressly prohibiting a sale of a water right acquired for the irrigation of land separate therefrom, but the claim is that because of certain provisions in our statutes such a prohibition is necessarily implied. That result is supposed to follow from the provision in section 873 of the Revised Statutes, which prescribes the form and contents of the certificate to be given to the appropriator after determining the priorities by the board of control, where it is provided that if such an appropriation be for irrigation, the certificate shall contain a description of the legal subdivision of land to which said water is to be applied; and the provision in section 917 of the Revised Statutes, that before any person intending to acquire a water right shall commence the construction, enlargement or extension of any ditch or other distributing works, he shall apply to the state engineer for a permit to make such appropriation, in which application the nature of the proposed use must be stated among other things, and a map to be filed with such application, as required by section 924, is required to show the location and area of all land proposed to be reclaimed, and upon the completion of such an appropriation in accordance with the application, a certificate is required to be sent to [229] the county clerk of the same character as that described in section 873; and the provision in section 872 that no allotment shall exceed more than one cubic foot of water for each seventy acres of land for which the appropriation was made.

It may be conceded that the various provisions in the statute requiring a showing as to the lands to be irrigated and a description thereof in the final certificate of appropriation tend to emphasize the principle that a water right acquired for the irrigation of lands becomes appurtenant to the lands irrigated, but we are unable to give to such provisions the interpretation contended for by the learned counsel for plaintiffs in error. They do not, in our judgment, have the effect in any true sense of destroying the reason upon which the right of sale separate from the land is upheld. They do not, in our judgment, have the effect to declare that the right to

use water acquired by appropriation is not in itself a property right, nor can any of the provisions to be found in our statute be legitimately construed as either expressly or impliedly depriving the right of its qualities as property, which it otherwise might have, and which, in every other state, is conceded to it.

In the able argument of counsel for plaintiffs in error, reference is made to the fact that in the state of Idaho constitutional and statutory provisions have been enacted for the purpose of rendering the water right acquired for the irrigation of lands forever incapable of separation therefrom by transfer; and we understand that in the statutes of that state there is a provision that the right of the water user shall not be considered as being a property right in itself, but that it shall become appurtenant to the land. It must be conceded that the Idaho statutes go much further than the statutes in this state in its declaration concerning the nature of a water right acquired for irrigation.

The Idaho statutes referred to have, however, been considered by the supreme court of that state, and the majority of that court held that users of water from a ditch [230] or canal acquired such a property right as they may transfer to other lands under such ditch or canal; and that they may also sell and transfer the right to use such waters, and the purchasers may transfer it to other lands under the ditch or canal, so long as the change of place does not interfere with the rights of others: Hard v. Boise City Irr. etc. Co., 9 Utah, 589, 76 Pac. 331, 65 L. R. A. 407. See, also, Boise City Irr. etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321. In the case first above cited, Mr. Justice Ailshie, in a concurring opinion, held that the provision that a water right should not be a property right in itself ought not to deprive such right of the character and quality which constitute it property; and Mr. Justice Stockslager, in delivering the opinion of the court, said: "That a party may change the point of diversion when he takes water from a natural stream is a settled question, provided he can do so without injury to any other appropriator of the waters of the same stream. We do not think it material whether he takes it to other land than that for which it was first appropriated, the only question being, Can he so change the place of diversion without injury to some other appropriator? That a party has such property interest in water appropriated and used for useful and beneficial

purposes that he can sell, we think, is beyond controversy; but the buyer cannot take the water to other lands than that for which it was appropriated, to the detriment of any other appropriator, is equally well settled. If, however, he can use it upon other lands more beneficially, where could there be a well-founded objection to such change?" There was a dissenting opinion in the case, but even that opinion recognizes the right of an original appropriator and owner of a water right to sell and transfer the right to be used upon other land.

In the brief of counsel for plaintiffs in error much is said with reference to the policy of the rule permitting a sale of a water right separate from the land, and counsel has submitted with such brief the views of a former state engineer of this state who worthily occupies an eminent position 231 as an irrigation engineer, and whose ability is unquestioned, and for whose opinions the members of this court entertain a high regard. We are, however, of the opinion that many of the objections to the doctrine that has been so firmly settled by the courts are fanciful, and that legislation in conformity therewith is capable of enactment which would remove many of the objections from the standpoint of an intelligent execution of the laws governing the distribution of the public waters.

In view of the persistency with which such objections are entertained, and the earnestness with which they are continually urged by those engaged in administering our laws on the subject of water appropriations, and the able presentation thereof by counsel, some reference to them seems advisable.

It is asserted that the doctrine of sale separate from land is the doctrine of the courts and not of irrigators. It is, of course, true that the public announcement of the doctrine is to be found in the decisions of courts, but had the owners of water rights not conceived that they had a property in their right to use water which they could convey for use on other lands, there doubtless would have been no conveyances to be considered by the courts. We cannot agree that the doctrine has resulted from ignorance concerning irrigation matters. Nor can we agree with the notion that men not necessarily or usually trained in the law are more competent than the courts to determine the legal principles controlling the use of water by prior appropriation, notwithstanding that

the judges may not as a rule be practical irrigators. The fact that judges have not been engaged in banking or commercial pursuits, or in managing railroads or other corporate interests, has not been put forward as an argument to combat the justness of the legal rules and doctrines that govern financial and commercial transactions, or that prescribe the duties and powers of railroad companies or other corporations. Legal doctrines in this country have generally come from the courts and must in the [232] nature of the constitution of our government continue so to do except where, within its province, the legislature declares what the law shall be. Indeed, the courts first announced the doctrine of prior appropriation. The law of this state conferring certain powers upon the board of control makes the courts the ultimate judges in case of controversy on appeal, and the courts surely are as much empowered, within the extent of their jurisdiction, to announce doctrines, as are administrative boards. We have no doubt, however, of the wisdom of the policy which places the initial determination of priorities in the hands of such a board.

It may be accepted as true that the rule permitting the sale of a water right separate from the land has been the source of litigation. But that affords no sufficient reason for destroying property rights. We cannot agree that, in order to discourage litigation or render it impossible, the court should devest the citizen of his property.

Counsel seem to treat the sale in controversy and the question generally of the right of sale separate from the land as a sale of the water itself. But the conveyance does not sell water. The appropriation was made by the use of water for the irrigation of land; and thereby a water right was obtained the nature of which is well understood and settled. The deed conveys an interest in that water right. The interest conveyed passed out of the hands of the original appropriator into the hands of its grantee. It became severed from the land to which it was originally attached, it is true, but it immediately became attached to other land. In the hands of the grantee the right became appurtenant to the land upon which the grantee intended and did apply it. Should the grantee not apply the right to a beneficial use, he could not, of course, retain it. The grantee can by nonuser abandon the right in the same manner as the original appropriator. This is not a case where an appropriator for irrigation pur-

poses seeks to hold the water for purpose of sale. The matter stands in the same situation [233] as though the grantor and grantee had originally made the appropriation and secured the water right in the proportions stated in the deed. The appropriator secured a property right. A portion of that right it sold to be benefically applied to other lands. It sold not water, but the right to use water; in other words, a water right.

We cannot agree that it requires a strained and distorted interpretation of our statutes to uphold the doctrine permitting the sale of a water right separate from the land. On the contrary, it would require a strained construction of the statutes to deny such a right. There is no reasonable indication in the statutes, in our opinion, that the requirements for describing the land to be irrigated in applications for permits, or in certificates of appropriation, was adopted on the theory that the water right becomes inseparably attached to the particular land, so as to forever be incapable of transfer to other lands. A more reasonable view of the purpose of the requirement is to show that an actual beneficial use has been or is intended to be made of the water claimed to have been appropriated or intended to be appropriated; and to enable those charged with the duty of adjudicating priorities to determine upon some definite basis the amount and quality of the appropriation; as well as to preserve a convenient record of water rights as appurtenant to certain tracts of land. But the fact that the legislative development of this growing subject has failed to provide for a record of transfers of the right to other lands, which we think might be done, is not to be held ground for holding that the right of transfer does not exist.

To adopt the view contended for against the validity of the conveyance in question would, in our judgment, require us to deny the element of property in the water right itself Nothing in the decisions on the subject nor in the statute authorizes that. The water right when sold does not become, as suggested, a mere "floating right." It becomes appurtenant to other land, if it is intended by the grantee for irrigation, or else is devoted to other equally beneficial [234] uses Without some beneficial use after sale, it would doubtless on a proper showing be held abandoned, as in the case of an original appropriator who should intentionally cease to use it.

Moreover, judging from the board's decree in this case, it would seem that the administrative officers have not adhered very strongly to the proposition that the statutes require a description of the land for the purpose of inseparably attaching the water right to the particular tract irrigated. The decree awarded to the Spring Vale Ditch Company a designated water right for the irrigation of seven hundred acres of land. But the particular tracts irrigated were not described, except that the said seven hundred acres are described generally as being located within certain larger tracts in the aggregate amounting to about eighteen hundred and forty acres. This might perhaps permit the appropriator to apply the water during one season to one part of the land described, and to another part in another season; and this may be the custom in farming under irrigation. To carry the theory contended for to its legitimate logical conclusion would seem to require that particular area through the irrigation of which the appropriation was made to be described minutely, and thereby show that the water right did not appertain to any other part of the land owned by the appropriator. But the statute evidently does not require such minutia of description, since it provides only for a description of the legal subdivisions to which the water is to be applied.

In view of the fact that the doctrine maintained in other states of the arid region must have been well known to those interested in our legislation, it is significant, it seems to us, that no express legislative declaration on the question has been incorporated in our statutes. And is it not also significant that, notwithstanding the expressions of this court in 1894, in the cases cited in an earlier part of this opinion, the statutes have continued silent in reference to the matter? It is, moreover, significant that the constitution [233] requires the legislature to provide by law for the exercise by incorporated cities, towns and villages of the right of eminent domain for the purpose of acquiring from prior appropriators, upon the payment of just compensation, such water as may be necessary for the well-being thereof and for domestic uses: Const., art. 13, sec. 5.

We are deeply sensible of the responsibility attending a decision of this important question. We have brought to its consideration for some time careful thought and study, and the result is that we can ascertain no reasonable ground for

departing from the well-settled principle so firmly and uniformly upheld by all the authorities.

We can perceive nothing in the fundamental principles underlying the doctrine of prior appropriation in the use of water that interferes with the right of sale of the water right, but, on the contrary, those principles seem to be in harmony with such right. Should the theory be adopted that water appropriated for the irrigation of a certain tract of land must be forever connected with that particular tract and cannot be separated therefrom in any manner by sale, by any other equally beneficial use, or otherwise, much injustice might be caused by reason of the failure of the particular tract to further respond to the skill of the husbandman; it might become valueless for many reasons unnecessary to mention, and the appropriator, who may have expended much money and time in completing the appropriation, would be compelled to forfeit it instead of supplying it to other lands. The state, certainly, as trustee of the water and interested in its conservation and economical distribution, can hardly be concerned in having a particular tract of land irrigated in preference to any other. Moreover, forfeitures have never been favored in the law. But is not a conclusive answer to the proposition for the new theory that there is no principle of law upon which it can be logically or reasonably based?

The evidence in this case shows that, after the conveyance of the water right in question, the grantor, the Spring
236 Vale Ditch Company, irrigated not more than one-half as much land as it had previously irrigated, and the grantee applied the water which it obtained, under the conveyance, to the irrigation of one hundred and eighty acres of land. This is not an increase over the quantity of land previously irrigated, and there is nothing in the testimony showing, or tending to show, that the use of the water since the transfer has resulted in an injury to the plaintiffs in error. Indeed, it is not claimed that they have been injured except upon the theory that they were entitled as the next succeeding appropriator to any water which the Spring Vale Ditch Company may have abandoned.

It must be understood that this case does not present any facts showing a sale of surplus water. The evidence discloses, without contradiction, that the entire amount of the maximum allowed to the Spring Vale Company was seldom, if ever, used, for the reason that the stream did not supply

sufficient water in ordinary seasons at least to allow such use. There is no evidence of waste. There is no showing that either of the parties to the deed used more water than they actually required.

It is suggested that the decree commands the plaintiffs in error at all times to refrain from any interference with the maximum quantity allowed by the board to the Spring Vale Ditch Company, in disregard of the custom and necessities of persons engaged in cultivating land by irrigation. It is said, in substance, that an appropriator does not require, and never actually uses, a uniform, continuous flow of a certain volume of water; that the allowance of a certain quantity is intended only as a maximum limit as to the use at any one time; but that water is generally used only about three months, and the maximum not over thirty days. Conceding all this, it is not apparent that the decree is to be interpreted as permitting the defendant in error to waste any of the water. If it did, it might require modification. The injunction is against interfering with the use and enjoyment by the defendant in error of the water [237] to which he is entitled. It clearly cannot operate to prevent the taking of any water which is not required by the defendant in error for the irrigation of the lands to which it is applied; nor do we think it was intended to so operate. The rule must be the same as between any other appropriators: Long on Irrigation, sec. 61.

There is nothing in the law of prior appropriation that prevents a change of the place of diversion, if that can be accomplished without injury to others. We are unable to discover in the evidence anything to show that the plaintiffs in error are injured by the diversion of the water under the conveyance at the headgate of the ditch of defendant in error, instead of at the point where it was originally diverted by the Spring Vale Ditch Company.

Neither do we discover from the evidence that the use of all the water by the owners on alternate weeks respectively, as provided in the deed, operated to the detriment of the plaintiffs in error. Such an agreement between several persons who have appropriated water as tenants in common does not seem to be objectionable in itself: Long on Irrigation, secs 61, 85; Kinney on Irrigation, secs. 301, 302; Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac 426; Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144,

71 Am. St. Rep. 123, 53 Pac. 318; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451. It is, of course, true that the defendant in error, as against subsequent appropriators, could use only so much as he could use beneficially. The deed having conveyed an undivided one-half of the water right to the defendant in error, the parties thereupon stood in relation to each other the same as if they had originally made a joint appropriation.

The record disclosing no error, the judgment will be affirmed.

Corn, C. J., concurs.

There may be a Sale of a Water Right separate from the land, and an application of the water to other land, so long as the rights of third persons are not infringed: Cache La Poudre Irr. Co. v. Larimer etc. Co., 25 Colo. 144, 71 Am. St. Rep. 123; Strickler v. Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245. But it has been held that a riparian proprietor cannot authorize a corporation to take water from a stream, to be conducted a distance and there sold, as against a lower proprietor: Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183.

STUDEBAKER BROTHERS COMPANY v. MAU.

[13 Wyo. 358, 80 Pac. 151.]

CONDITIONAL SALE or Chattel Mortgage.—In determining whether a contract amounts to a conditional sale or a chattel mortgage, the intention of the parties controls; and this is ascertained from all the language used in the contract, the circumstances attending the transaction, and the conduct of the parties. Such a construction should be adopted, if possible, as will harmonize and give effect to all the terms and provisions of the contract. (p. 1005.)

CONDITIONAL SALE—Retention of Title by Vendor.—A condition in a contract for the transfer of personal property that the title shall not pass from the vendor until the purchase price is paid in full is inconsistent with an absolute sale and a mortgage back. (p. 1006.)

CONDITIONAL SALE—Absolute Promise to Pay.—An absolute obligation to pay the purchase price of a chattel, whether or not the vendor should retake possession of it, is not inconsistent with a conditional sale. (p. 1006.)

CONDITIONAL SALE or Chattel Mortgage.—A contract note for the transfer of personal property which provides that the title shall not pass to the vendee until full payment of the purchase price and interest, and that the vendor may retake possession of the property at any time when he deems himself insecure, and sell the property and apply the proceeds on the note, or, without a sale, indorse the true value of the property on the note, the vendee to pay any balance due after the indorsement as damages and rental, amounts to a conditional sale rather than a chattel mortgage. (p. 1006.)

CONDITIONAL SALE—Conflict of Laws.—In determining whether a contract is a conditional sale or chattel mortgage, it should be construed according to the law of the state where the parties resided, the property was situated, and the contract was made. (p. 1006.)

CONDITIONAL SALE—Practical Construction by Parties.—In determining whether a contract is a conditional sale or a chattel mortgage, the supreme court will not be unmindful of the construction put upon the contract by both parties in the trial court. (p. 1007.)

CONDITIONAL SALES—Conflict of Laws.—If a conditional sale is valid in the state where made, without recording, but the vendee, without the knowledge or consent of the vendor, thereafter removes the property to another state, and there sells it to a bona fide purchaser, the conditional vendor may recover the property in that state, notwithstanding his conditional sale is invalid there for want of recording. (pp. 1007, 1008.)

CONDITIONAL SALES.—**The Lex Loci Contractus governs** the validity of conditional sales. (p. 1008.)

B. M. Ausherman, for the plaintiff in error.

J. H. Ryckman and S. T. Corn, for the defendant in error.

[362] BEARD, J. The plaintiff in error commenced this action in justice's court to recover the possession of a buggy. There was a trial to a jury, verdict and judgment for defendant Mau. [363] Plaintiff appealed to the district court, where the case was tried to a jury, which resulted in a verdict for the defendant and judgment was rendered thereon against plaintiff, a motion for a new trial was denied, exceptions taken and plaintiff brings error.

The plaintiff claimed to be the owner and entitled to the immediate possession of the property by virtue of a written contract, which is as follows:

"30472.

"Idaho. No. 19103.

"$130.00 Salt Lake City, Utah, May 2, 1903.

"On or before the 2 day of December, 1903, for value received in 1 No. 806 World buggy, Carmine gear, whip cord trim, No. 14½ single harness, 1 whip and lap duster, hereafter called 'said property,' bought of Studebaker Bros. Co. of Utah, or either of us, promise to pay to the order of said company, at its office in Salt Lake City, one hundred and thirty dollars, with 10 per cent interest per annum from date, 1903, until maturity, and if not paid at maturity the rate of interest shall thereafter be one per cent per month until paid, and reasonable attorney's fees, if placed in the hands of an attorney for collection.

"The express condition of this transaction is that the title or ownership of 'said property' does not pass from the said company until this note and interest shall be paid in full, and the said company has full power to declare this note due and take possession of said property, when it deems itself insecure, even before the maturity of this note; and it is further agreed by the makers hereof, that they will not sell or dispose of the said property except on the written order of said company. In case said company shall take possession of the said property it may at its pleasure sell the same at public or private sale without notice, and apply the proceeds on this note, or it may without sale indorse the true value of said property on the note, and ————, or either of us, agree to pay on this note any balance due thereon after indorsement, as damages and rental for said [364] property; as to this debt, we waive the right to exempt, and property, real or personal, we now own or may hereafter acquire, by virtue of any homestead or exemption law, now in force or that may hereafter be enacted. I agree to pay 15.00 per month and cash 15.00 down.

"Postoffice Farmington.) . . miles north. SAMUEL MAHAN.
County c/o Bp. Secrest,) . . miles south HENRY SECRIST.
Davis) . . miles east
State Utah.) . . miles west
) of postoffice."

The defendant denied plaintiff's ownership and alleged that he had, in good faith, for a valuable consideration and without knowledge or notice of plaintiff's claim, purchased said property from Samuel Mahan in Uinta county, Wyoming.

The facts as they appeared upon the trial and as conceded by both parties are: That the plaintiff on May 2, 1903, sold and delivered to Samuel Mahan and Henry Secrist the property in dispute on the terms and conditions contained in the above-recited contract; that nothing more was paid thereon than appears by the indorsements, being the sum of forty-five dollars; that plaintiff was a Utah corporation doing business in Salt Lake City, Utah; that Secrist and Mahan were at the time residents of Utah; that the contract was made and the property delivered at Salt Lake City in said state; that some time thereafter, without the knowledge or consent of plaintiff, Mahan removed said property to Wyoming and about September 12, 1903, sold the same to defendant Mau, who pur-

chased the same for cash and without knowledge or notice of plaintiff's claim; that plaintiff did not know that the property had been removed from Utah until about the time of the commencement of the action.

It is also admitted that the laws of Utah require chattel mortgages to be filed with the county clerk to be valid as against bona fide purchasers, but that conditional sales are valid in that state without being filed, both as against creditors and bona fide purchasers.

[365] Upon the trial, the court, at the request of defendant and over plaintiff's objection, gave the jury the following instruction: "The court instructs the jury that the sale of the property in controversy from the Studebaker Company to Mahan was a conditional sale, reserving in the vendor the title until the purchase price should be paid in full, and that the law of this state in regard to conditional sales is as follows:

"No sale, contract or lease wherein the transfer or title of ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in possession, without notice, unless the same be in writing, signed by the vendee or lessee, and the original or a copy thereof filed in the office of the county clerk of the county wherein the property is; said instrument so filed shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor or vendee, or lessor or lessee, with a description of the property transferred and the full and true interest of the vendor or lessor therein. All such sales or transfers shall cease to be valid against the purchasers in good faith, or judgment or attaching creditors without notice at the expiration of one year from the date of such sale unless the vendor or lessor shall within thirty days prior to the one year from date of such sale or transfer file a similar affidavit to the one above provided for in the office of said clerk, and the said vendor or lessor may preserve the validity of his said sale or transfer of such personal property by an annual refiling in the manner as aforesaid of such copy."

The giving of this instruction, it is claimed by plaintiff, was error. The plaintiff requested the court to instruct the jury as follows: "The court instructs the jury that if they find from the evidence in this case that conditional sale of this

property was made to a party who was a resident of the state of Utah, and that there was a contract executed and delivered [366] by which the title to the property in question was to remain in the plaintiff until full payment was made therefor, and that the purchaser thereafter brought said property into the state of Wyoming without the knowledge of the plaintiff or vendor, and sold the same to this defendant, that the plaintiff by such action was not deprived of its title or ownership and is entitled to recover the property wherever it might be found, and under such circumstances your finding should be for the plaintiff."

Several other instructions to the same effect, but in different language, were requested by plaintiff and refused by the court. The refusal of the court to so instruct is assigned as error.

Two questions have been presented in the briefs and arguments of counsel: 1. Was the transaction a conditional sale, or an absolute sale with a mortgage back? 2. If it was a conditional sale, was it necessary for plaintiff to have complied with the statutes of Wyoming requiring such contracts to be in writing and filed with the county clerk?

The proper construction of contracts of the character of the one involved in this action is always attended with some difficulty by reason of the narrow line of distinction between conditional sale contracts and chattel mortgages, each case depending upon its peculiar or special circumstances. The intention of the parties is to control; and this is to be ascertained from all of the language used in the contract, the circumstances attending the transaction and the conduct of the parties. Such a construction should be adopted as will, if possible, harmonize and give effect to all of the terms and provisions of the contract without omitting or disregarding any of them. It is made an express condition of this contract that the title or ownership of the property should not pass from the company until the purchase price should be paid in full. This was a condition to be performed before the title should pass from the company and is entirely inconsistent [367] with the idea of an absolute sale and a mortgage back. In 6 American and English Encyclopedia of Law, 446, it is said: "When by the written contract of the parties it is expressly provided that the title to the property shall remain in the vendor until the purchase money is fully paid, and there is no reservation of a lien, the transaction is a con-

ditional sale and not a mortgage," citing authorities. And in Mechem on Sales, section 583, the learned author quotes with approval from Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1110, as follows: "It is very difficult to see how a contract for the sale of personal property, in which it is agreed that the title of the property shall remain in the vendor, and the possession in the vendee, until payment of the debt, can be called a mortgage by the most liberal construction," citing a number of cases. In order to construe the contract in this case to be a mortgage, this plain and express provision must be entirely disregarded. On the other hand, counsel for defendant contend that other terms of the contract show it to be a mortgage, and that to hold that it is a conditional sale is to disregard such terms. It is argued that the obligation to pay the purchase price was absolute whether the company should retake possession of the property or not, and that that constitutes the transaction a sale with security back; and in support of that position they cite Andrews & Co v. Colorado Sav. Bank, 20 Colo. 313, 46 Am. St. Rep. 291, 36 Pac. 902; Palmer v. Howard, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858; Hart v. Barney, 7 Fed. 543; and other cases in which that was held to be a controlling feature in determining the question, and the contracts were held to be mortgages. Mechem, in discussing the Colorado case and the others of like holding, says: "It is believed, however, that the doctrines here laid down are not in harmony with those generally prevailing elsewhere": Mechem on Sales, sec. 579, and citing Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 285; Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519, and many other cases, holding that such a provision in a contract is not inconsistent with retention of title in the vendor until full payment, and we think the weight of authority sustains that position.

368 The contract in this case is almost identical with the one in Harkness v. Russell, and that was held to be a conditional sale and not a mortgage. Other terms and conditions of the contract have been discussed, but we do not think they are in conflict with the views we have taken. This contract having been made in Utah, between residents of that state where the property was situated, should be construed according to the laws of that state; and where similar contracts have been construed by the courts of that state, their

decisions should have great weight in determining the character of this one: 22 Am. & Eng. Ency. of Law, 1342; Story on Conflict of Laws, sec. 263. In a very recent case, decided by the supreme court of Utah since the argument of this case, that court held a contract, which contained many more of the elements of a mortgage than the one under consideration here, to be a contract of conditional sale. The opinion is an elaborate one and considers the whole subject: Freed Furniture etc. Co. v. Sorenson, 28 Utah, 419, 107 Am. St. Rep. 731, 79 Pac. 564. For still another reason we think this particular contract should be construed as we have construed it, and that is because that was the construction placed upon it by both parties on the trial in the district court. Plaintiff's theory was that it was a conditional sale; and it was at the request of defendant's attorney that the court instructed the jury "that the sale of the property in controversy from the Studebaker company to Mahan was a conditional sale, reserving in the vendor the title until the purchase price should be paid in full, and that the law of this state in regard to conditional sales is as follows" (giving the Wyoming statute). The subject of a mortgage does not appear to have been mentioned on the trial. We find no error in the construction placed upon the contract by the district court.

Upon the other branch of the case it is admitted that the contract was valid in the state of Utah, not only as between the parties, but also as to bona fide purchasers from the conditional vendee, and that such contracts were not required to be recorded or filed by the statutes of that state. But it [369] is contended by the defendant that, when the property was brought into this state, where such sales are invalid against a purchaser, without notice, unless the same be in writing, signed by the vendee, and the original or a copy thereof filed in the office of the county clerk of the county wherein the property is, he acquired by his purchase a good title as against the plaintiff. This involves the question as to which law shall govern, the law of the state where the contract was made, or the law of the state where it is sought to be enforced. It has been held by most of the courts of this country, and we think with much reason that where, as in this case, a conditional sale of personal property is made in one state between parties residing in that state and where the property is then situated and delivered, and

without any agreement or intention that the property is to be removed to another state, and such contract is valid, although not filed or recorded, in the state where made, against bona fide purchasers from the conditional vendee, and the conditional vendee, without the knowledge or consent of the vendor, removes the property to another state and there sells it to a bona fide purchaser, such purchaser acquires only such rights in the property as the conditional vendee had therein. And that the conditional vendor can recover the property from such purchaser, notwithstanding the fact that the conditional sale would have been invalid for want of filing or record under the laws of the state to which the property was removed and where it was sought to be recovered. Or, in other words, in such cases, the lex loci contractus will govern.

The rule is stated in Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364, to be that the validity and effect of contracts relating to personal property are to be determined by the laws of the state or country where they are made, and, as a matter of comity, they will, if valid there, be enforced in another state or country, although not executed or recorded according to the laws of the latter. And the rule has been applied in a great number of cases to chattel mortgages, where the [370] mortgagor moves with the property into another state. And in Mechem on Sales, section 649, it is said: "This rule has, with substantial unanimity, been applied to cases of conditional contracts of sale": See, also, 22 Am. & Eng. Ency. of Law, 1342, where cases are collected.

In Shapard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, Judge Thayer, speaking for the circuit court of appeals, says: "The general concensus of judicial opinion seems to be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is duly executed and recorded by the mode required by the local law, so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not recorded in the state to which the removal is made": Citing Hornthal v. Burwell, 109 N. C. 10, 26 Am. St. Rep. 556, 13 S. E. 721, 13 L. R. A. 740; Smith v. McLean, 24 Iowa, 322; Handly v. Harris, 48 Kan. 606, 30 Am. St. Rep. 322, 29 Pac. 1145, 17 L. R. A. 703; National Bank v. City of Morris, 114 Mo. 255, 35 Am. St.

Rep 754, 21 S. W. 511, 19 L. R. A. 463; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Langworthy v. Little, 12 Cush. 109; Whitney v. Heywood, 6 Cush. 82; Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Feurt v Rowell, 62 Mo. 524; Cool v. Roche, 20 Neb. 550, 31 N. W. 367; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 634; Offut v. Flag, 10 N. H. 46; Lathe v. Schoff, 60 N. H. 34; Barrows v. Turner, 50 Me. 127; Hall v. Pillow, 31 Ark. 32; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525; Ballard v. Winter, 12 Am. Law Reg., N. S., 759; Jones on Chattel Mortgages, 4th ed., sec. 260, which he says fully sustain that position, and that Michigan is the only state which does not so hold.

Defendant's counsel cite Hart v. Barney, 7 Fed. 543, but that case is not in point, for the reason that the agent of the defendant who made the contract knew that the cars were to be taken to another state. And in Cunningham v. Cureton, 96 Ga. 489, 23 S. E. 420, the property was in Georgia when the conditional contract of sale was made. The same was true in Green v. Van Buskirk, 5 Wall. 307, 18 L. ed. 599; the assignment of [371] the property was made in New York, but the property was at the time in Chicago.

We think the district court erred in giving the instruction complained of and in refusing to instruct as requested by plaintiff, for which errors the judgment of the district court is reversed and the case remanded to said court for a new trial.

Potter, J., concurs.

Conditional Sales are discussed in the monographic notes to Fleet v. Hertz, 94 Am. St. Rep. 234; Andrews v. Colorado Sav. Bank, 46 Am. St. Rep. 295; Palmer v. Howard, 1 Am. St. Rep. 63. Questions similar to those involved in the principal case will be found discussed at length in the recent case of Freed Furniture etc. Co. v. Sorensen, 28 Utah, 419, 107 Am. St. Rep. 731.

CHEESEMAN v. FENTON.

[13 Wyo. 436, 80 Pac. 823.]

REPLEVIN—Possession as Evidence of Title.—Since possession is prima facie lawful and prima facie evidence of title, one who has been deprived of his possession by a trespasser may, without other proof of title, maintain replevin to recover the property. (p. 1012.)

REPLEVIN.—If the Defendants in Replevin claim under a writ of attachment, but fail to connect themselves with the possession of the officer under the writ, it is error, although the plaintiff fails to prove title or right of possession in himself, to award a judgment in favor of the defendant for the value of the property, on the theory that it is less than the value of the writ. The only judgment to which they are entitled, if any, is for costs. (p. 1014.)

REPLEVIN — Attached Property. — Where an Officer seizes property under an attachment writ which is in the possession of a stranger to the attachment suit under a claim of ownership, it is incumbent on the officer, when sued in replevin by such person for a recovery of the property, to show not only a writ valid on its face, but the regularity of the attachment proceedings. (p. 1015.)

REPLEVIN—Attached Property.—When an Officer attaches property in the possession of a stranger who purchased it at a foreclosure sale, he is not in a position, when sued in replevin by that person, to question the latter's title, without showing the validity of his writ on its face and the regularity of the attachment proceedings. (pp. 1015, 1016.)

JUSTICE OF PEACE.—A Writ of Attachment is authorized to be issued under the statutes of Wyoming by a justice of the peace only at or after the commencement of a civil action, which is required to be commenced by a summons. (p. 1018.)

JUSTICE OF PEACE—Attachment—Summons.—A justice of the peace has no authority, under the statutes of Wyoming, to issue an attachment, unless a summons has been issued, either separately or as a part of the writ of attachment, although the defendant cannot be personally served. (p. 1018.)

E. E. Enterline and W. L. Simpson, for the plaintiffs in error.

E. E. Lonabaugh, Coker Rathbone and De Witt C. Wenzell, for the defendants in error.

443 POTTER, J. This is an action of replevin brought in the district court, Big Horn county, for the possession of four cows described in the petition. The suit was brought by Harris E. Cheeseman against John J. Fenton, sheriff of Big Horn county, William Arnold, a deputy sheriff, and Joseph Cline. The petition alleges that the plaintiff is the owner and entitled to the immediate possession of the property, and that the same is wrongfully, illegally and fraudulently de-

tained by the defendant Arnold. The answer is a general denial. Upon the trial of the action before the court without a jury, the finding was for the defendants, and that they had the right of property and possession at the commencement of the action, and judgment was rendered in their favor and against the plaintiff and his surety for one hundred and twenty dollars, the value of the property, and costs. The plaintiff and his surety bring the cause here on error, assigning as error the rendition of the judgment and the overruling of the motion for new trial. The writ of replevin is not in the record, nor the undertaking, but the judgment indicates that the property was taken upon the writ and delivered to the plaintiff.

The plaintiff testified that he was the owner of the property in controversy at the time of the commencement of the suit, and that he bought the same from the First National Bank of Meeteetse, Wyoming, at a sale upon foreclosure of a chattel mortgage; and enough appears to show that the chattel mortgage referred to was one executed to said bank [444] by Musa B. Stephenson and Robert B. Stephenson. Upon his offer of the chattel mortgage under which the sale was had, it was excluded on the ground that it did not describe the property claimed. Afterward the defense introduced in evidence, without objection, a chattel mortgage executed to said bank by said Musa B. and Robert B. Stephenson, apparently describing and conveying other cattle than those in controversy. But it was not shown whether said mortgage was the one under which the sale occurred, or the one offered by the plaintiff, nor whether it was the only chattel mortgage between the same parties.

An offer by the plaintiff on rebuttal to show that the bank had been in possession of the cattle under a bill of sale from the Stephensons was excluded. None of the foreclosure proceedings were shown except the time and place of sale; and it appeared that the sale had not taken place in view of the property, nor in lieu thereof, at the courthouse, as provided by statute: Rev. Stats. 1899, sec. 2825. In the absence of proof that the sale occurred under a mortgage authorizing it, and covering the property in suit, and it appearing that the sale had not occurred in the manner required by law, the plaintiff failed to establish title in himself, except, perhaps, such title as may be presumed from possession. But it is contended that, as the property was taken from him when he

was in possession, claiming ownership, he had a right to such possession as against defendants, who, it is further contended, failed to show any right of property or possession.

The evidence as to plaintiff's possession is not very satisfactory. He testified that when he bought the cows they were upon his ranch, and as his possession of them at that time is not disputed, it was doubtless assumed, and we may assume that he was then, and immediately after his alleged purchase, in possession. There is no direct evidence that such possession continued until the property was taken upon the attachment writ under which defendants claimed, and that fact is not proven unless the rule be applied that where [445] a certain state of affairs of a continuing nature is shown to exist at one time, its continuance will be presumed until the contrary is shown. If they were taken from his possession by either of the defendants without any right on their part to the property, so that they would be mere trespassers, he would, of course, be entitled to recover the possession as against them, since possession is prima facie lawful, and is in itself prima facie evidence of title: Van Baalen v. Dean, 27 Mich. 104; Cobbey on Replevin, sec. 135; 24 Ency. of Law, 2d ed., 485, 502; Lewis v. Birdsey, 19 Or. 164, 26 Pac. 623. But the evidence as to the possession of the plaintiff is so unsatisfactory that, had the judgment been for the defendants for costs merely, it might probably have been sustained The defendants having, however, been awarded a judgment for the full value of the property, based upon a finding of right of property and right of possession in them, it is necessary to consider whether that finding is warranted by the evidence.

The evidence upon that subject consisted solely of certain proceedings in attachment before C. W. McNair, a justice of the peace, wherein, one Joe Cline was plaintiff and Musa B. and Robert B. Stephenson were defendants, the plaintiff seeking to cover a judgment for one hundred and fifty-two dollars and ninety cents. The sufficiency of the showing as to those proceedings to sustain the judgment rendered by the justice, and to constitute a valid attachment of the property, or to establish a right in the defendants, is challenged by the plaintiffs in error.

Its appears that on July 13, 1903, Cline, the plaintiff in that suit, filed a petition, an affidavit for attachment, and an undertaking in attachment, and that on July 14, 1903, the justice issued a writ of attachment making it returnable

July 17, 1903, and that it was returned and filed July 15, 1903. The writ of attachment appeared to have been lost, and there was no proof of its contents, nor whether an inventory of any property attached was made and returned with the writ. The justice's docket does not state to what officer the writ was delivered, as required by section 4430 of the [446] Revised Statutes of 1899, and there was no proof upon that subject. The writ is required to be directed to the sheriff or any constable of the county: Rev. Stats. 1899, sec. 4454. Neither is there any evidence to show what officer executed the writ. It does appear from the docket of the justice that on September 4, 1903, nearly a month after judgment was rendered, and shortly prior to the commencement of this action, an execution was delivered to the defendant Arnold, a deputy sheriff, but the evidence disclosed that the execution had not been returned, and there is nothing to show whether it was ever levied, or what, if anything, was done with it or under it by the officer. Moreover, it appears that the only service, if any, upon the defendants was by publication, that they did not appear, and that their default was entered. Under such circumstances no execution can be rightfully issued until the plaintiff, or some person in his behalf, shall execute a bond, with approved surety, conditioned that if the defendant shall, within one year from the judgment, appear and disprove the debt or damages, or any part thereof, the plaintiff will refund the whole, or such part thereof as may be found justly due him in a review of the case: Rev. Stats. 4484. It does not appear that such a bond was executed.

However, there is an entire absence of proof that the property in question was ever taken under the execution. Hence, it furnishes no justification to Arnold or either of the defendants.

Neither of the defendants testified in the case, but a witness on their behalf who had been attorney for the plaintiff in the attachment suit, testified without objection that the officer, without naming him, had levied the writ of attachment upon the cows in dispute, in addition, it seems, to other property, and that he took possession thereof July 16, 1903, and kept them until they were taken from him by replevin; but the witness did not explain whether he referred to the replevin writ in this action or some other. The witness testified on cross-examination that his knowledge of the fact [447] that the cows in dispute had been levied upon had been derived

from the officer's return to the writ, which he had made out for the officer, but he leaves the identity of the officer to mere inference. From a careful reading of the testimony, we think it impossible to say what officer had the attachment writ and executed it. The record does not even inform us whether the property was found in Arnold's possession or not, though the petition alleges that he unlawfully detained it from the plaintiff. He does not appear to be the only deputy sheriff in the county, and probably was not. The sheriff, who was made a party defendant to this suit, is not alleged to have been in possession of the property at any time, and the same is true as to the other defendant, Cline, and the evidence does not disclose that either of them ever had possession. Although Cline was supposedly the plaintiff in the attachment suit, that fact would not entitle him to the possession of the attached property under the writ. That right would belong to the officer who executed the writ, and who would hold the property subject to such disposition as the law provides.

Having failed, therefore, to connect themselves with the possession of the officer under the writ of attachment, the defendants were not entitled to a judgment for the value of the property, on the theory that it was less than the value of the writ, for the defendant in possession may not have held the property under that writ. Assuming that plaintiff had not shown any right to possession, the defendant from whom the property was taken under the replevin writ might possibly, if there were no other defects in the case for the defense, have been entitled to a judgment for costs, but not for the value of the property, unless it had been shown that he had taken it and held it by virtue of the writ of attachment.

Further, as above stated, it appeared that the officer, whoever he may have been, took possession of the property under the writ July 16, 1903. By the docket entry of the justice, the writ had been returned and filed the day previous—July [448] 15, 1903. Did the officer attempt to levy upon the property without taking possession? Or did he make the alleged levy after he had returned the writ? The testimony does not give a direct or clear answer to these inquiries. The writ not being returnable until the 17th, the officer might have executed it by a levy on the 16th, unless he had parted with possession and control of the writ by its return on the 15th, and perhaps he might have again

taken it on the 16th and made the levy. But if he did so, there is no evidence that he made a subsequent return.

On the ground, however, that the evidence does not connect the possession of either of the defendants, if either had possession, with the writ of attachment, we are of opinion that the court was not justified in awarding the defendants a judgment for the value of the property, and that the judgment for that reason must be reversed, there having been no other right of possession shown on the part of the defendants.

As the action must be remanded for a new trial, there are some other important questions which we think may properly be considered to the end that another trial may be had upon what seems to us to be the principles applicable to the case.

The jurisdiction of the justice to issue the writ of attachment is questioned. That question may become pertinent in the event that plaintiff be shown to have been in possession claiming ownership, when the attachment was levied. The rule is that where an officer seizes property under an attachment writ which is in the possession of a stranger to the attachment suit under claim of ownership, it is incumbent on the officer, when sued in replevin by such person for a recovery of the property, to show not only a writ valid on its face, but the regularity of the attachment proceedings: Jones v. McQueen, 13 Utah, 178, 45 Pac. 202; Drake on Attachment, sec. 185a; Thornburgh v. Hand, 7 Cal. 554; Horn v. Corvarubias, 51 Cal. 524; Mathews v. Densmore, 43 Mich. 461, 5 N. W. 669; Van Etten v. [449] Hurst, 6 Hill, 311; 41 Am. Dec. 748; Brinchman v. Ross, 67 Cal. 601, 8 Pac. 316; Williams v. Eikenberry, 25 Neb. 721, 13 Am. St. Rep. 517, 41 N. W. 770; Cobbey on Replevin, sec. 1009; Marrinan v. Knight, 7 Okla. 419, 54 Pac. 656; James v. Van Duyn, 45 Wis. 512; Bogert v. Phelps, 14 Wis. 88; Shinn on Replevin, secs. 535, 537. Otherwise the officer is not in a position to question the title of the third person from whom he takes the property. The point has more frequently been decided, perhaps, in actions between a mortgagee, or an assignee of the attachment defendant, and the officer serving the attachment writ, where it has been attempted to assail the mortgage or assignment for fraud or invalidity as against creditors. The officer holding under attachment only becomes entitled to question the validity or the good faith of the transaction attempted to be avoided on the ground that, through a valid writ, he

represents the creditors who may have instituted a proceeding entitling them to attack the transaction. And as was said in that connection by Mr. Justice Cooley, in Mathews v. Densmore, 43 Mich. 461, 5 N. W. 669: "But if he has no such writ, it is no concern of his whether the mortgages are valid or not. The first step in his justification is, therefore, to show not a writ merely, but a valid writ." In that case the writ was held invalid because the affidavit upon which it had been issued was insufficient under the statute.

In the case at bar, if the plaintiff was in possession of the property under a purchase at a foreclosure sale, it cannot concern the defendants whether the sale was lawfully conducted or not, or whether in point of fact the property was covered by the mortgage under which the sale occurred, unless they have acquired some right in or lien upon the property, authorizing them to assail plaintiff's title. A mere stranger, one without any sort of claim to the property, would clearly have been unauthorized to take it away from the plaintiff, and retain it, on the ground that the plaintiff's purchase gave him no title.

It was incumbent upon the defendants, upon the theory that plaintiff's possession under claim of title had been [450] invaded by the levy of the writ of attachment, to show a valid writ of attachment. And this, we think, they clearly failed to do. The justice's docket did not show that a separate summons had issued in the attachment suit, nor was there any evidence that one had been issued, nor did it appear that the writ of attachment contained the substance of a summons. The justice was called as a witness and asked if the writ contained the substance of a summons, and he answered that he did not know. No other attempt was made to show that it did.

The proceedings before the justice, as shown by the papers and docket entries, were as follows: July 13, 1903, plaintiff therein filed a petition, affidavit for attachment, and an undertaking. A writ of attachment was issued July 14, 1903, returnable July 17, 1903, at 4 o'clock P. M. returned and filed July 15, 1903. At 4 o'clock July 17, 1903, the attorney for plaintiff appeared and entered a motion for an order for service by publication, upon the ground that defendants were without the state, and personal service could not be had; the motion was granted and the case again set for hearing

August 10, 1903, at 10 o'clock A. M. On August 10, 1903, at 10 o'clock A. M. affidavit of service by publication was presented and filed, found to be legal and in due form; and at 11 o'clock one full hour after the time set for hearing, defendants failed to appear and were declared to be in default. Plaintiff introduced his evidence, and judgment was rendered in favor of plaintiff for the full amount of his claim and costs, and it was ordered "that the attached goods and chattels be sold to satisfy the judgment."

There is a docket entry to the effect that on September 4, 1903, an execution was issued and delivered to William Arnold, deputy sheriff. It does not appear by the docket that the execution had been returned, nor what had been done under it, though the justice testified that it had not been returned.

Civil actions before justices of the peace are required to be commenced by summons, or by the appearance of the [451] parties without summons: Rev. Stats. 1899, sec. 4331. The summons is required to contain, among other things, a description of plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him; and the statute provides that there shall be indorsed on the summons the amount for which plaintiff will take judgment, if the defendant fail to appear. A judgment cannot be entered for a larger amount and costs than is claimed: Rev. Stats. 1899, sec. 4333. The summons must be returnable not more than twelve days from its date, and served not less than three days before the time of appearance: Rev. Stats. 1899, sec. 4334.

Upon certain grounds specified in the statute the plaintiff by following the prescribed procedure may have a writ of attachment in a civil action before a justice of the peace, at the time or after the commencement thereof: Rev. Stats. 1899, 4452. If the writ of attachment is issued at the commencement of the suit, it is required to contain the substance of a summons, and no separate summons is necessary. If issued after the summons, the writ must be made returnable at the same time as the summons: Rev. Stats. 1899, sec. 4478. When the defendant cannot be summoned, and his property or effects shall be attached, if he do not appear, the justice is required to enter an order in his docket, requiring the plaintiff to give notice to the defendant by publication in a

newspaper or by posting, as set forth in the statute: Rev. Stats. 1899, sec. 4481.

The section of the Revised Statutes last above cited contains a misprint of one provision as originally enacted, which error is found in every compilation and revision since the act was originally passed. In the revision it reads, "if he do not appear to the action of the return writ," referring to the want of appearance on the part of defendant. It originally read, and no doubt is to be so understood, "if he do not appear to the action at the return of the writ": Laws 1871, p. 58, sec. 154.

A writ of attachment is thus authorized to be issued by a justice of the peace only at or after the commencement of a [452] civil action, which is required to be commenced by a summons. Does it appear by the showing made that such an action had been commenced when the writ in question was issued? There was no separate summons issued, and none at all, unless the substance of a summons was contained in the writ, and that is not shown. Although the petition and affidavit and bond for attachment were filed July 13, 1903, nothing seems to have been done on that day by the justice, and unquestionably the intention was to issue the writ at the commencement of the action. There is clearly nothing here to show the commencement of an action prior to issuing the writ.

The statute expressly requires the writ to contain the substance of a summons when issued at the commencement of the action. That is a jurisdictional requirement. Where a summons has not already been issued in the case, the justice has no authority to issue a writ of attachment unless the writ itself shall contain the substance of a summons. Otherwise no action would be commenced, and an attachment is not authorized except at or after the commencement of an action.

It is argued that, as the defendants were out of the state, and personal service of summons was, therefore, impossible, the issuance of a summons would have been useless, and that a summons is not necessary when service is to be obtained by publication or by posting notices, as required by section 4481 of the Revised Statutes. It might be a sufficient answer to say that the statute expressly requires that a summons be issued either separately or embraced in the writ to constitute the commencement of action, and that without an action pre-

viously commenced, or concurrently with the issuance of the writ of attachment, no jurisdiction exists for its issuance.

But the statute will not bear the construction contended for. It is only after property of a defendant has been attached, and his failure to appear at the return of the writ, the writ referred to being the summons or the attachment [453] writ containing a summons, that an order for publication may be made. There must then have been a writ of attachment issued, otherwise the defendant's property could not have been attached; and an action must have been commenced, to authorize the issuance of an attachment writ. There is no provision in the justice's code, similar to that of the Civil Code governing the practice in the district court, for an affidavit showing the necessity and statutory grounds for constructive service.

The statute provides: "When a defendant cannot be summoned, and his property or effects shall be attached, if he does not appear," etc., "the justice shall enter an order in his docket" for notice to be given as therein specified. How is it to be determined that the defendant cannot be summoned? Clearly, we think, by the officer's return upon the summons or writ, as the case may be, since no other source of information is provided for. The publication thereafter and proof thereof operates to give the justice jurisdiction, but it does not in all respects take the place of a summons. The suit is not authorized to be commenced by the publication, nor by the order therefor, but by a summons. The evidence in the case, therefore, was insufficient to show a valid writ of attachment.

The judgment will be reversed and the cause remanded for a new trial.

Beard, J., concurs.

Van Orsdel, J., did not sit.

In Replevin the Bare Possession of property by the plaintiff is enough to support a recovery against a trespasser: See the monographic note to Sinnot v. Feiock, 80 Am. St. Rep. 746, on when replevin is maintainable.

Replevin Against Public Officers is discussed in the note to Carpenter v. Annis, 25 Am. St. Rep. 256-259. It is said that when an officer attaches property in the possession of a stranger claiming title in replevin by such person, the officer, to justify his possession, must not only show that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued: Williams v. Eikenberry, 25 Neb. 721, 13 Am. St. Rep. 517.

MATTHEWS v. NEFSY.

[13 Wyo. 458, 81 Pac. 305.]

MORTGAGE—Assignment—Sufficiency of Description.—There is a sufficient identification of the mortgage in an assignment thereof which gives the names of the mortgagor and mortgagee and the book and pages of the record where it is recorded. (p. 1021.)

MORTGAGE—Assignment by Corporation.—If the assignment of a mortgage is signed, "The Bailey Loan Co., by H. N. Johnson, Treas.," and bears the seal of the company, the fact that the notes and mortgage have been delivered to the assignee by the company tends to show that the treasurer was authorized to make the assignment, and amounts to a ratification of his act in so doing if it was done without previous authority. (p. 1021.)

IN EJECTMENT the Legal Title is all that is in issue. (p. 1022.)

MORTGAGE SALE—Collateral Attack—Purchaser's Deed.—Where a sale has been made under a power contained in a mortgage or a trust deed, and a deed has been made to the purchaser by the trustee or sheriff, it will be presumed on collateral attack in an action at law that the requirements of the mortgage and the statutes as to notice have been complied with, and that the proceedings have been regular; and evidence, other than the deed and its recitals, is unnecessary to show legal title in the purchaser. (p. 1022.)

E. E. Enterline and H. A. Alden, for the defendant in error.

Nichols & Adams and Van Cise & Grant, for the plaintiff in error.

467 BEARD, J. The plaintiff in error, Joseph L. Matthews, commenced this action in the district court of Crook county, against the defendant in error, Ann Nefsy, alleging in his petition that he was the legal owner in fee simple and entitled to the immediate possession of lot 1, block 29, of Bowman's addition to Sundance, Wyoming, and that the defendant, without right or title, unlawfully entered upon the premises and took possession thereof and has kept and still keeps plaintiff out of possession. The answer of defendant "denies that the plaintiff has a legal estate in the premises described 468 in the petition, or is entitled to the possession thereof."

The case was tried to the court without a jury, and the court found generally for the defendant and entered judgment as follows: "It is, therefore, by the court considered and adjudged that the plaintiff take nothing by said action. It is further adjudged and decreed that the defendant's title to said property be settled and quieted so far as any

claim which the plaintiff may have in this action against the same, said property being lot 1, in block 29, in Bowman's addition to the town of Sundance, Wyoming, and it is further ordered that the plaintiff pay the cost of this case."

A motion for a new trial was denied, exceptions taken and plaintiff brings error.

The plaintiff claims title and right to possession of the lot in question under a deed executed to him as the purchaser at a sale of the lot upon the foreclosure of a mortgage thereon. It is conceded that on January 2, 1893, one George Barton was the owner of the lot; and it appears that on that date he, joined by his wife, executed a mortgage upon it to the Bailey Loan Company to secure the sum of $300 evidenced by three notes of the same date and due January 1, 1896. The mortgage was acknowledged October 28, 1893, and filed for record November 1, 1893. Plaintiff introduced the mortgage in evidence and then offered an assignment of it by the mortgagee to Mary Dickinson. This assignment is signed, "The Bailey Loan Co., by H. N. Johnson, Treas.," and bears the seal of the company. The defendant objected to the offer for the reason that it did not show that Johnson, the treasurer of the company, was authorized to make the assignment and because it is not an assignment of the mortgage and note in controversy. The court reserved its ruling on this objection, to which both parties excepted; but there is nothing in the record from which we can ascertain how the court ruled upon the point; but it does not appear, however, that the assignment was read in [469] evidence. The assignment describes the mortgage assigned by giving the names of the mortgagors and mortgagee and the book and pages of the record where it is recorded. This was sufficient identification of it. It appears from the testimony of the plaintiff that he knew about the note and mortgage back to the time of the assignment to Mrs. Dickinson, and that he had personal knowledge that she had them in her possession. This testimony is not contradicted. The notes and mortgage having been delivered to her by the company would tend to show that Johnson was authorized to make the assignment, and would amount to a ratification of his act in so doing, if it was done without previous authority from the company. We think the court erred in holding the assignment void, if it did so hold. The mortgage was afterward assigned by

Mrs. Dickinson to plaintiff—both assignments being recorded—and it was foreclosed by advertisement and sale of the lot August 16, 1902, the sheriff of Crook county conducting the sale, the plaintiff became the purchaser, and on the same day the sheriff executed to plaintiff a deed for the lot in pursuance of such sale, which deed was duly recorded and is the source of plaintiff's title, if any he has. This deed was introduced in evidence; but counsel for defendant contend that it was insufficient to show title in the plaintiff, and that it was incumbent upon plaintiff to prove the regularity of each step in the foreclosure proceedings and to show a strict compliance with all statutory requirements as to notice of sale, the manner of its publication, and that the sale was conducted in strict accordance with the direction of the statute; and they claim, among other alleged irregularities, that the notice was signed by the sheriff, that it was not shown to have been published in a newspaper "printed" in Crook county or in the state of Wyoming, and several other objections of a similar character.

We do not agree with counsel in this contention. This is an action in ejectment and the legal title is all that is in issue. The mortgage contains a provision for foreclosure [470] by notice and sale of the property, and the deed of the sheriff recites that the sale was made in pursuance of this power, and that due and legal notice of the sale was given, and sets out in detail the contents of the notice, the manner of its publication and when, where and how the sale was conducted; and conveys the legal title to the lot to plaintiff, the recitals in the deed showing compliance with the terms of the mortgage and the requirements of the statute. Where a sale is made under a power contained in a mortgage or trust deed, and a deed has been made to the purchaser at such sale by the trustee, or as in this case, by the sheriff, it will be presumed upon collateral attack in an action at law that the requirements of the mortgage and of the statute as to notice have been complied with and that the proceedings were regular, and that evidence, other than the deed and its recitals is unnecessary to show the legal title in the plaintiff. In 2 Jones on Mortgages, sixth edition, section 1830, the law is stated as follows: "When the validity of a sale under a power is questioned, on the ground that the advertisement of the sale was not made in pursuance of the deed, the better opinion is that in an action at law it will be presumed, after the

execution of a deed under the power of sale to the purchaser, that all the terms of the power and all requirements as to notice have been complied with. Certainly, in an action of ejectment by the purchaser against the grantor or other person in possession, no evidence aside from the deed to such purchaser and the recitals in it is necessary to show title and right of possession in the plaintiff. It would seem, moreover, that the defendant would not be permitted to prove that notice of sale was not given under the power, because the deed would confer upon the purchaser the legal title to the land."

In Windett v. Hurlbut, 115 Ill. 403, 5 N. E. 589, the action was forcible entry and detainer by a purchaser at a sale by a trustee, pursuant to the power in a deed of trust. The court says: "Appellee gave in evidence, upon the trial in the superior court, among other things, the deed of trust, [471] and the deed by the trustee to himself. Appellant, in defense, offered parol evidence to prove that the trustee in fact made no sale, that appellee had paid nothing for the property, and that it was worth thirty thousand dollars, and constituted appellant's homestead; but the court held the evidence inadmissible, and refused to hear it—and this is the first and principal error for which it is contended the judgment below should be reversed. Very clearly the ruling was right. This is not a suit in equity to set aside the trustee's deed, but an action at law, in which legal, as contradistinguished from equitable, principles must control." Lunsford v. Speaks, 112 N. C. 608, 17 S. E. 430, Savings etc. Soc. v. Deering, 66 Cal. 281, 5 Pac 353, Fulton v. Johnson, 24 W. Va. 95, are to the same effect.

Plaintiff also offered in evidence the recorded affidavits of the publisher of the newspaper in which the notice of sale was published and of the sheriff who conducted the sale, being the record to perpetuate the evidence of the sale, and we find nothing in this evidence which shows affirmatively that the sale was not properly advertised and regularly conducted. A copy of the notice is contained in this evidence, and it shows that it was signed by the attorneys for the assignee of the mortgage as well as by the sheriff. The defendant offered no evidence whatever to show that due notice of the sale had not been given or that there were any irregularities in the proceedings which would render the sale void, if indeed she should be permitted to do so in this action. We think the evidence showed title in the plaintiff and his right to possession unless the defendant showed as good or better

title in herself. At the time of the commencement of the action she was in possession of the lot claiming the title under a tax deed, dated October 31, 1898. This deed was introduced in evidence by the defendant and recites that it was made in pursuance of a tax sale held August 29, 1896 for the taxes of 1894 and 1895. Attached to the deed is a notice of the expiration of the time for redemption from tax sale, dated July 30, 1898, and addressed [472] to George Barton, the owner, and to Bert Wade, the person in possession, notifying them that the time for redemption from the tax sale would expire August 29, 1898. Service of this notice was excepted by Barton and Wade August 29, 1898, the last day for redemption. Under the statute in force at the time (Rev. Stats. 1899, sec. 1895), such notice was required to be served at least three months before the expiration of the time for redemption. It is, therefore, apparent that the notice in this instance did not confer any authority upon the treasurer to execute the deed. Since that time, however, the statute has been amended permitting notice to be given after the period for redemption has expired: Sess. Laws 1901, c. 16.

There is another reason why this deed did not vest in defendant any title to the lot in controversy. That is that the deed upon its face does not purport to convey that lot. Both the tax deed and the notice of expiration of the time for redemption describe the property as lot 1, block 29, in the town of the city of Sundance. Nowhere in the tax proceedings does Bowman's addition to the town of Sundance appear. In the assessment and tax-rolls there is a lot 1, block 29, in the town of Sundance, and in the treasurer's certificate of tax sale it is lot 1, block 29, apparently in Kimm's addition.

For the reasons above stated, we think the district court erred in finding for the defendant. Counsel for defendant concede that it was error to grant defendant affirmative relief under the pleadings. The judgment of the district court is reversed and the case remanded for a new trial.

Potter, C. J., concurs.

Van Orsdel, J., did not sit.

Sales Under Powers in Mortgages and trust deeds are discussed in the monographic notes to Houston v. National etc. Loan Assn., 92 Am. St. Rep. 573; Tyler v. Herring, 19 Am. St. Rep. 266-297.

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ACTIONS.

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2. ACTIONS—Nature of.—A claim filed in a county court by a widow against her deceased husband's estate for money alleged to have been loaned him is in the nature of an action to recover upon a contract, and not upon an equitable right of subrogation. (Wis.) Charmley v. Charmley, 827.

Amendment Changing Cause.

3. ACTIONS—Amendment.—It is not permissible to entirely change the nature of a cause of action by amendment, as substituting one in equity for one at law, or one in contract for one sounding in tort. (Wis.) Charmley v. Charmley, 827.

4. ACTIONS—Amendment Changing Cause of Action.—If a widow files a claim against her husband's estate for money alleged to have been loaned him to pay a mortgage on their homestead, it is error for the circuit court on an appeal from the county court disallowing the claim to permit a change in the nature of the cause of action by amendment to conform to the proof, so as to state a cause of action for subrogation to the rights of the mortgagee. (Wis.) Charmley v. Charmley, 827.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION Founded on Gift—Evidence.—When adverse possession is founded on a gift, the burden of proof, as to improvements made and other acts of ownership upon the faith of the gift, is on him who asserts title by virtue of the donation and possession. (Utah) Raleigh v. Wells, 689.

2. ADVERSE POSSESSION Founded on Gift—Evidence.—Where adverse possession is founded on a parol gift, the gift must be established by clear and convincing evidence, and the possession must be shown to have been hostile and not merely that of a licensee. (Utah) Raleigh v. Wells, 689.

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ALTERATION OF INSTRUMENTS.

INSTRUMENTS in Blank, Authority to Fill up.—A person having executed an instrument, leaving blank spaces therein to be filled, and delivered the same in such imperfect condition to another for use, the presumption is, nothing appearing to the contrary, that such person intended to confer upon such other authority to complete the instrument. The rule above stated applies to instruments required by law to be executed under seal and to be witnessed and acknowledged in order to entitle the same to be recorded, as well as to simple contracts. (Wis.) Friend v. Yahr, 924.

AMENDMENTS.

See Actions; Pleading.

APPEAL AND ERROR.

1. **FUGITIVE from Justice—Appeal by.**—The appellate court will not determine the correctness of the action of the lower court in issuing an injunction and writ of ne exeat, and render a decree therein, while the appellant, who has escaped from custody, and in defiance of the court and its writs, remains beyond its jurisdiction and renders it powerless to enforce any decree upon this feature of the case, which it might render. (Fla.) Bronk v. Bronk, 101.

2. **APPELLATE PRACTICE.—Bills of Exceptions are Construed** most strongly against the party excepting, and if they will admit of two constructions, one of which will reverse and the other support the judgment, the latter will be adopted. (Ala.) Dickens v. State, 17.

3. **APPEAL AND ERROR—Delay in Filing Undertaking.**—Under a statute providing that any person aggrieved by a decision of a county court may appeal therefrom to a circuit court by filing a notice thereof with such county court within sixty days from the date of the act appealed from, together with an undertaking thereon, if the notice of appeal is filed in time, the fact that the undertaking is not filed with the notice is not a fatal defect, although it is not filed within the time limited for the taking of the appeal. The filing of such undertaking afterward will perfect the appeal. (Wis.) Charmley v. Charmley, 827.

4. **APPEAL—Jurisdiction—Costs.**—If the amount in controversy is sufficient to confer appellate jurisdiction, but the appellant is prejudiced by an error in sum less than the jurisdictional amount, costs in the appellate court must be adjudged to the appellee. (W. Va.) Wallace v. Leroy, 777.

5. **APPEAL—Jurisdiction.—The Amount Claimed** by the appellant in the court below, and not the amount which he was really entitled to recover, is the test of appellate jurisdiction. (W. Va.) Wallace v. Leroy, 777.

6. **APPEAL.—The Appellate Court must Look at the Evidence** most favorable to the respondent in considering whether the trial court should have directed a verdict for the appellants. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

7. **APPEAL—Bill Confessed—Errors Reviewable.**—An appeal from a decree upon a bill taken for confessed, after the overruling of a motion to correct it, specifying certain errors therein and charging generally the existence of others, brings before the appellate court all of the errors of law in the decree. (W. Va.) George v. Zinn, 721.

8. **APPEAL AND ERROR—Waiver of Objections.**—The submission to a trial on the merits waives all defects not prior thereto brought to the attention of the circuit court and duly insisted upon. (Wis.) Charmley v. Charmley, 827.

9. **APPEAL.**—Where the Findings on the Question of a conflict between mining locations are based upon maps and drawings from the land office, which are properly identified, authenticated and introduced in evidence, but which are not before the supreme court, such findings will not be reviewed. (Utah) Stewart v. Gold and Copper Co., 719.

10. **APPEAL AND ERROR.**—The Finding of the Trial Court on a Question of Fact will not be disturbed on appeal, unless the evidence as preserved in the record so clearly preponderates against the decision as to indicate that for some reason material evidence was overlooked or not properly considered which might reasonably change the result. (Wis.) Chase v. Hinckley, 896.

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ARREST.

CRIMINAL LAW—Arrest by Private Citizen.—Under a statute providing that a private citizen may arrest a person for an offense attempted in his presence, where a person boards a street-car for the purpose of robbery, whereupon an employé of the railway company directs him to put up his hands, he is in effect under arrest, and it becomes his duty to throw down his gun and surrender, and the employé has a right to use whatever force is necessary to disarm him and prevent his escape. (Utah) State v. Shockley, 639.

ASSIGNMENTS.

ASSIGNMENT OF ACCOUNT—Action on—Want of Consideration.—If the statute authorized an action at law by the assignee under an assignment of an account, the debtor cannot raise the objection of a want of consideration for the assignment. (W. Va.) Wallace v. Leroy, 777.

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ATTACHMENTS.

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ATTORNEY AND CLIENT.

1. **ATTORNEYS—Contempt—Suspension from Practice.**—Where a judge sentences an attorney to jail for contempt committed before him, he exhausts his power to punish for that particular offense, and cannot, after the attorney is released on bail in habeas corpus proceedings, arbitrarily suspend him from practice in that court until the contempt is atoned for or the judgment of conviction satisfied or set aside. (Ill.) People v. Kavanagh, 223.

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2. ATTORNEYS—Cause and Manner of Suspension.—The right of an attorney to practice law is a right of which he cannot be deprived by the courts except for legal cause, and then only in the manner pointed out by law. (Ill.) People v. Kavanagh, 223.

See Executors and Administrators, 4; Mandamus.

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BANKRUPTCY.

1. BANKRUPTCY—Preferences—Deposit in Bank.—Money deposited in a bank in the due course of business by an insolvent within four months of the time that he is adjudged a bankrupt is not a transfer of property constituting a preference within the meaning of the national bankrupt act, and the bank may apply the amount of such deposit upon a note due from such insolvent to it. (Minn.) Habegger v. First National Bank, 379.

2. BANKRUPTCY—Construction of Act.—That portion of the national bankruptcy act providing that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of the petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," applies to voluntary as well as involuntary bankruptcy. (Minn.) Cavanaugh v. Fenley, 382.

3. BANKRUPTCY — Garnishment—Discharge of Liens.—A garnishment of money belonging to an insolvent within four months of the time he is adjudged a bankrupt is dissolved and rendered void by the bankruptcy proceedings, although the insolvent made no reference in his schedule of assets to the fact that the indebtedness had been garnished. (Minn.) Cavanaugh v. Fenley, 382.

4. BANKRUPTCY—Liens Discharged by —Annulment of Judgment.—A judgment entered against an insolvent person, upon a provable claim existing against him at the time he was adjudged a bankrupt, but entered before his final discharge in bankruptcy, is canceled and annulled by such discharge, and the bankrupt has a right, after obtaining his discharge in bankruptcy, if he proceeds within a reasonable time, to have execution upon such judgment perpetually stayed. (Minn.) Cavanaugh v. Fenley, 382.

BANKS AND BANKING.

1. BANKS AND BANKING—Usage and Custom.—The general custom in banking business is to pay an account of a depositor, carried on the bank's books in open account subject to check, only upon a proper demand therefor by check or its equivalent at the banking-house during ordinary banking hours, and one who deposits money for his credit in such an account, without any special understanding to the contrary, is presumed to accept the undertaking of the bank to pay according to the general usage in such cases, and such is the

contract between the bank and its general depositors by necessary implication. (Wis.) Koelzer v. First Nat. Bank, 870.

2. BANKS AND BANKING—Statute of Limitations—Demand for Deposit.—An action will not lie against a bank for a general deposit until after a demand has been made therefor by check or otherwise, and until then the statute of limitations does not begin to run against the bank. (Wis.) Koelzer v. First Nat. Bank, 870.

3. BANKS AND BANKING—Trust Funds.—If money held by a person in a fiduciary capacity, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands. (Wis.) Boyle v. Northwestern Nat. Bank, 844.

4. BANKS AND BANKING—Trust Funds.—If a broker sells grain on commission and deposits the proceeds, together with his commissions, in a bank to the credit of the account under which he does business, such deposit, pending a settlement of his account with his customers, constitutes a trust fund, which, to the extent of the balance of the deposit at the termination of the broker's business, the bank cannot hold, as against such customers, to apply on an old indebtedness of a corporation of which he had formerly been president, although the money has been mingled with the general funds of the bank. (Wis.) Boyle v. Northwestern Nat. Bank, 844.

5. BANKS AND BANKING—Trust Funds.—If a broker deposits the proceeds of grain sold by him to the credit of a bank account under which he does business, and the bank, with knowledge that the money so deposited belongs to his customers, induces him to give a check on such account to apply on an indebtedness of a corporation of which he was formerly president, subsequent customers of such broker whose money has gone into such deposit cannot impose a trust to the amount of such check thereon, for their benefit, when the amount thus diverted did not arise from the sale of their property. (Wis.) Boyle v. Northwestern Nat. Bank, 844.

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BASTARDY.

See Death; Marriage, 3, 4.

BILLS AND NOTES.

1. BILLS AND NOTES—Waiver of Protest.—If an indorser on a note indorses on it a waiver of protest one year and a half after its maturity, with knowledge that no demand for payment has been made or notice of dishonor given him, he becomes liable on the note. (Pa. St.) Burgettstown Nat. Bank v. Nill, 554.

2. BILLS AND NOTES—Waiver of Protest.—A new consideration is not required to support a waiver of protest of a note either before or after its maturity. (Pa. St.) Burgettstown Nat. Bank v. Nill, 554

3. BILLS AND NOTES—Waiver of Protest—Fraud.—If the indorser of a note seeks to avoid the effect of his waiver of protest thereof on the ground of fraudulent representations made to him at the time of the waiver, he must aver in his affidavit of defense that he was induced to sign the waiver by reason of such misrepresentations. (Pa. St.) Burgettstown Nat. Bank v. Nill, 554.

BLANKS.

See Alteration of Instruments; Contracts, 1.

BONDS.

1. COUNTY BONDS—Curative Statute.—The adjudication by a court of competent jurisdiction that a proposed issue of county bonds is unauthorized and void, because of some irregularity of procedure, does not defeat the power and right of the legislature by a subsequent curative statute to authorize their issuance and sale. (Fla.) Given v. County of Hillsborough, 104.

2. COUNTY BONDS—Sale of—Notice.—The notice of sale of county bonds required by statute need not state that the bids therefor shall be payable in current funds, or in evidence of indebtedness of the county. (Fla.) Givens v. County of Hillsborough, 104.

3. COUNTY BONDS—Issuance—Injunction.—An allegation in a bill filed to enjoin the issuance of county bonds, questioning the regularity of the appointment of bond trustees for the proposed issue, accords no ground for enjoining the issuance of such bonds. (Fla.) Givens v. County of Hillsborough, 104.

See Principal and Surety.

BOUNDARIES.

1. BOUNDARIES—Evidence.—If, in case of a dispute as to the boundary between two tracts of land, evidence is introduced to show the amount of land contained in certain lots, it is permissible, in rebuttal, to introduce tax returns of the defendants, while claiming as owners, to show that they returned the lots as containing less land than their evidence showed. (Ga.) Ivey v. Cowart, 160.

2. BOUNDARIES—Evidence.—In case of a dispute as to boundary between two tracts, evidence that when a prior survey of the land was made a proposition was made by one of the parties to the other to the present dispute to begin a survey at a point which the proposer claimed was undisputed, and that the decision based upon the line thus run should be final, if rejected by the adverse party at the time, is not admissible in behalf of the party making the proposition. (Ga.) Ivey v. Cowart, 160.

3. BOUNDARIES—Traditionary Evidence.—If a public boundary, such as a county line, is the dividing line between two lots, the facts of use and occupancy by other neighboring land owners, whose land is also bounded by the county line, for more than twenty years up to a certain line as the county line, erecting fences, and treating it as the county line, and the fact that such line coincides with that claimed by one of the parties to the dispute concerning the true boundary line, is admissible in evidence, but such traditionary evidence is not conclusive on the other party to the dispute as to the location of the county line, and its weight is to be determined by the jury. (Ga.) Ivey v. Cowart, 160.

4. BOUNDARIES—Establishment by Acquiescence.—Acquiescence for seven years by acts and declarations of adjoining land owners establishes a dividing line, but if different lots of land are described as being bounded by a line between two counties, acquiescence for seven years by owners of some of the lands thus bounded is not conclusive as to the true location of the line as against others whose lands touched the line at a different point. (Ga.) Ivey v. Cowart, 160.

5. BOUNDARIES by Acquiescence.—If the location of a boundary line is uncertain, and the parties to the controversy about its true location, or their predecessors in title while holding it, have acquiesced by acts or declarations for seven years or more in a dividing

line between their lots this would establish it as to them. (Ga.) Ivey v. Cowart, 160.

6. **BOUNDARIES—Original Survey Controls.**—An original survey of lands, upon the faith of which property rights have been acquired, controls over surveys subsequently made which injuriously affect such rights. (Utah) Washington Rock Co. v. Young, 666.

7. **BOUNDARIES—Re-establishment of Lost Corners.**—Where the monuments of corners which, if standing, would fix the boundaries of a tract of land, are lost, but the corner monument from which the initial survey was made remains intact, such monument, in the absence of other controlling evidence which will protect the property rights acquired on the faith of that survey and which will be most likely to restore the original lines and monuments, should be resorted to and adopted as the beginning point of subsequent surveys of the same tract. (Utah) Washington Rock Co. v. Young, 666.

8. **BOUNDARIES—Original Survey Conclusive.**—On a resurvey of a tract of land to establish lost boundaries, the original corners, as established by the government surveyors, if they can be found, or the places where they were originally established, if they can definitely be determined, are conclusive, without regard to whether they are located correctly. (Utah) Washington Rock Co. v. Young, 666.

9. **BOUNDARIES.—When an Entry of Public Land is Made** in the land office upon the faith of the original government survey, the patent, when issued, relates to the date of the entry and refers to the lines actually run on the ground. (Utah) Washington Rock Co. v. Young, 666.

10. **SURVEYS, LOCATION OF.—When Direct Evidence of Stakes and Monuments Set by the Surveyor as Marking the Boundaries of the Land cannot be Found** nor testimony procured of a witness to show the lines run, the next in directness in the line of the evidence is that of an occupation commenced by persons having knowledge as to the place of the original location, or at a time when the original stakes were still in place. Failing in that, the next evidence in conclusiveness is the courses and distances declared in the plat and connecting the points in question with some other point, the actual location of which can be ascertained. (Wis.) Pereles v. Gross, 901.

11. **SURVEYS—Plats Declaring Distances, When Control.**—Where there is no direct evidence as to the place of physical location on the ground of the line or point in question or of any intervening point, the declaration of the plat that it is so many feet in a given direction from the starting point must control in the absence of other physical marks inconsistent with that result. (Wis.) Pereles v. Gross, 901.

12. **SURVEYS—Plats Declaring Distances, When not Controlled by the Scale of the Plat.**—The declaration of distance shown by a plat is not to be rejected for the purpose of adopting the length of the line as it appears by measuring on such plat by the scale appearing thereon, especially when the scale is so small that the very width of a line drawn thereon is a foot or more. (Wis.) Pereles v. Gross, 901.

13. **SURVEYS—Plats—Space to be Given to the Last Dimension When it is not Designated.**—When, in subdividing a line or space, the surveyor declares the dimensions he has given to each subdivision except the last, and there leaves an irregular space without designating its dimensions, he is presumed to have thrown all the remainder, much or little, into that irregular and unmeasured portion. (Wis.) Pereles v. Gross, 901.

14. **SURVEYS.—In Resurveying a Tract of Land According to a Former Plat or Survey,** the surveyor's only function or right is to relocate, upon the best evidence obtainable, the courses and lines at the same place where originally located by the first surveyor on the ground. Any departure from such purpose and effort is unprofessional and, so far as any effect is claimed for it, is unlawful. (Wis.) Pereles v. Gross, 901.

15. **SURVEYS—Plats—Picture of Lines of Streets, When not Controlling.**—The fact that the lines of streets on the northeasterly side of W. street as shown on a plat coincide with extended lines thereon of streets south of W. street does not necessarily establish the coincidence of the lines of streets on the two sides of W. street as against statements of distances contained in the same plat, and the fact that the streets on the north side, being wider and running at different angles, could not exactly correspond with the lines of the streets on the south. (Wis.) Pereles v. Gross, 901.

16. **SURVEYS—Plats—Actual Occupation, When not Controlling in Construction of.**—Practical location and use and occupation, in order to be evidence of original location, must be open to the inference that it commenced with some reference to the original survey lines or markings, and cannot prevail when clearly referable to a mistaken or deluding subsequent survey. (Wis.) Pereles v. Gross, 901.

17. **SURVEYS AND PLATS—Question for the Jury.**—When the inferences to be drawn from a plat or survey and from the location and use of the property intended to be represented thereon are conflicting, the court cannot take from the jury and determine, as a matter of law, the location of the lines represented on such plat. (Wis.) Pereles v. Gross, 901.

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BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS — Insolvency — Earned Premiums.**—The receiver of an insolvent building and loan association is not entitled to charge a borrowing member with a so-called "earned premium," when such premium is in the form of a deduction for the sum loaned, and the member is not in arrears for dues or assessments nor chargeable with the fact that the association is insolvent. (Fla.) Ottensoser v. Scott, 137.

2. **BUILDING AND LOAN ASSOCIATIONS — Insolvency — Credit Due to Members.**—In settling the affairs of an insolvent building and loan association, borrowing members are not entitled to credit for the full face or book value of their stock, but only for a pro rata thereof, such as actual conditions may warrant, based on the net assets in the hands of the receiver. (Fla.) Ottensoser v. Scott, 137.

3. **BUILDING AND LOAN ASSOCIATIONS—Insolvency—Attorney Fees.**—In winding up the affairs of an insolvent building and loan association, attorney fees are properly allowed against borrowing members when their mortgages provide therefor. (Fla.) Ottensoser v. Scott, 137.

4. **BUILDING AND LOAN ASSOCIATIONS—Insolvency—Res Judicata.**—Borrowing Members of an insolvent building and loan association have a right to contest a scheme of settlement agreed upon by a majority of the stockholders, and adopted by the court in a bill filed by certain other stockholders, "on behalf of themselves and all others who may be similarly situated and having like interests who may join them as complainants" against the association, if none of such borrowing members are in the same class with such complainants, and the facts that such borrowing members filed their protest against such scheme and were represented by counsel who appeared, do not constitute a res judicata, if they did not intervene, nor place themselves in a position to control the case on appeal, and no action was taken by the court upon such protest. (Fla.) Ottensoser v. Scott, 137.

5. **BUILDING AND LOAN ASSOCIATIONS—Foreign Loan Contract—Construction.**—If a loan is made to a member of a foreign building and loan association, and the bond executed provides that the obligation is a contract made in another state and governed by the laws of that state, it must be construed, as to the application of payments, in accordance with the laws of that state. (S. C.) Equitable Building etc. Assn. v. Corley, 615.

BUILDING CONTRACTS.

See Contracts, 7-9.

CARRIERS.

Carriers of Passengers.

1. **NEGLIGENCE, CONTRIBUTORY—Injury to Railroad Passenger.**—A passenger on a railroad train at night who passes from one car to another, and by the trainmen, in search of drinking water, and who, in so doing, steps off the platform of the rear car while thinking that he is going into another car, cannot recover for injury thus received, as the proximate cause thereof is his own contributory negligence, although there is no light or guard chain on the platform of such rear car. (S. C.) Hunter v. Atlantic etc. R. R. Co., 605.

2. **CARRIERS—Baggage.**—The price of a passenger ticket includes compensation for the carriage of such baggage as may be necessary for the personal convenience of the passenger. (S. C.) Adger v. Blue Ridge Ry. Co., 568.

3. **CARRIERS—Loss of Baggage.**—If a person applies for a passenger ticket and transportation of baggage over the line of an initial carrier and its connecting lines, and notifies the carrier at the time that he does not intend to become a passenger over the initial line, whereupon the carrier refuses to sell him a through ticket, but does sell him a ticket over its own lines, and receives and checks the baggage through to its destination over its own and connecting lines, it is liable for the value of such baggage in case it is lost. (S. C.) Adger v. Blue Ridge Ry. Co., 568.

4. **CARRIERS—Duty to Stop at Flag Stations.**—A statute providing that trains shall stop at advertised stations for the accommodation of passengers does not apply to flag stations not advertised. (S. C.) Milhous v. Southern Railway, 620.

5. **CARRIERS—Flag Stations—Refusal to Stop—Damages.**—If an engineer upon a railroad train willfully passes a flag station without stopping, seeing a person intending to become a passenger standing there, the latter is entitled to recover punitive damages of the railroad company. (S. C.) Milhous v. Southern Railway, 620.

6. **CARRIERS—Failure to Stop at Flag Station—Damages.**—In estimating damages for the failure of a railroad train to stop at a flag station for a person intending to become a passenger, his inconvenience, which is the direct result of the negligence of the trainmen, may be considered in estimating the damages. (S. C.) Milhous v. Southern Railway, 620.

7. **CARRIERS—Refusal to Stop at Flag Station.**—If a complaint alleges that a conductor on a railroad train was acting within the scope of his authority when he refused or failed to stop the train at a flag station, a request to charge that such conductor was not called upon to look out for signals of intending passengers is properly refused as inapplicable. (S. C.) Milhous v. Southern Railway, 620.

Carriers of Livestock.

8. **CARRIERS — Livestock.**—A common carrier of goods who transports livestock is, as to the latter property, also a common carrier. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

9. **CARRIERS OF LIVESTOCK may, by Special Contract, so limit their liability for loss or damage that they will be liable only in the event that they are guilty of gross neglicence.** (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

Carriers of Goods.

10. **CARRIERS—Selection of Unsuitable Car by Shipper.**—If a consignor selects for the transportation of goods sold a car which,

by reason of defects discernible upon inspection, is unsuitable for that particular class of goods, the carrier is not liable for a loss of the goods due to the unsuitableness and defective condition of the car. (Mich.) Frohlich v. Pennsylvania Co., 310.

11. CARRIERS—Agency Between Consignor and Consignee.—A consignor is the agent of the consignee in the shipment of goods, and whatever contract he makes with the carrier is binding upon the consignee. (Mich.) Frohlich v. Pennsylvania Co., 310.

12. CARRIERS—Loss of Freight—Damages.—If a box of pictures is shipped, marked and billed as glass, in the absence of actual fraud, the carrier is liable, in case of loss, only for the value of a box of glass. (S. C.) Bottum v. Charleston etc. Ry. Co., 610.

13. CARRIERS—Marks on Freight.—If pictures are shipped in a box marked "glass," the carrier is not required to inquire into the nature and value of the contents of the box. (S. C.) Bottum v. Charleston etc. Ry. Co., 610.

14. CARRIERS—Contents of Packages.—A common carrier has a clear right to know the contents of packages offered for shipment in order that he may fix his compensation and know his risk, and the statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely, and if the value or character of the article shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier, or the risk of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. (S. C.) Bottum v. Charleston etc. Ry. Co., 610.

15. CARRIERS—Loss of Freight—Evidence.—If it is sought to recover from a common carrier for the loss of a box of goods, evidence of the nature of its contents is admissible. (S. C.) Bottum v. Charleston etc. Ry. Co., 610.

16. CARRIERS—Act of God—Burden of Proof.—In order for a common carrier to avail himself of the act of God as an excuse for liability, the burden of proof is upon him to establish not only that the act of God ultimately caused the loss, but that his own negligence did not contribute thereto. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

17. CARRIERS—Delay in Delivery.—Damages for loss in failing to mill rice carried by a number of persons to other mills cannot be recovered against a common carrier for delay in delivering a rice huller, if he has no notice of the use to which the huller is to be put by the purchaser and consignee. (S. C.) Traywick v. Southern Ry. Co., 563.

18. DAMAGES—Notice of Purpose for Which Property is Purchased.—The fact that a rice huller is shipped to a firm at a point other than its usual place of business is not one which the carrier must consider for the purpose of determining whether the purchaser, who is the transferee of the bill of lading, had bought such huller with the object of making a profit by hulling rice. (S. C.) Traywick v. Southern Ry. Co., 563.

19. CARRIERS—Negligent Delay in Shipment—Act of God.—If a common carrier negligently and carelessly delays the shipment of goods intrusted to him for transportation, whether they are perishable or not, and such goods are damaged while in transit by an act of God which could not reasonably have been anticipated, but which would not have caused the damage had there been no delay in shipment, the carrier is liable. Such negligence and unreasonable delay

are such proximate or concurring causes as render the carrier liable in such case. (Minn.) Bibb Broom Corn Co. v. Atchison etc. Ry. Co., 361.

20. **CARRIERS—Liability for Delay in Shipment.**—A common carrier to whom goods are delivered for transportation must forward them promptly and without unreasonable delay to their destination. Failing to do so, he may be held liable in damages therefor. (Minn.) Bibb Broom Corn Co. v. Atchison etc. Ry. Co., 361.

21. **CARRIERS—Bills of Lading—Delivery.**—Any effort on the part of the carrier to surrender a shipment of freight at variance with a bill of lading drawn "to order" is at his peril, and he must be prepared to pay the full value of the shipment, or take upon himself the burden of proving himself justified in making such surrender. (S. C.) General Electric Co. v. Southern Ry., 600.

22. **CARRIERS—Bill of Lading "to Order"—Delivery.**—If goods are shipped under a bill of lading "to order" of the shipper, "notify" a third person, and has a draft attached, drawn by such shipper, and the carrier delivers the goods to such third person without requiring his surrender of the bill of lading properly indorsed, and without being ordered to do so by the shipper, the carrier becomes liable for the full value of the shipment. (S. C.) General Electric Co. v. Southern Ry., 600.

Insanity of Engineer.

23. **CARRIERS — Negligence—Insanity—Act of God.**—If an engineer in charge of an engine drawing a railroad train suddenly becomes insane and negligently runs his engine at such an excessive rate of speed as to result in wrecking one of the cars and causing the loss of property being transported, such insanity is not an act of God to which the loss can be attributed so as to excuse the carrier from liability. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

24. **CARRIERS OF LIVESTOCK—Insanity of Engineer—Burden of Proof.**—If a common carrier is transporting livestock under a special contract limiting its liability for loss to fraud or gross negligence, it is a good defense that the engineer upon the train carrying such stock suddenly became insane without the knowledge of the carrier, and that his acts while so insane caused the loss, but the burden of proof is upon the carrier to show not only such insanity on the part of its engineer, but also that it or its other agents were not chargeable with gross negligence contributing to the loss. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

Limiting Liability.

25. **CARRIERS—Right to Limit Liability.**—A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold; but by special contract he may relieve himself of his common-law liability as an insurer, and from liability arising from losses which do not involve his negligence or that of his servants. He cannot, however, even by special contract, exempt himself from liability for goods intrusted to him and lost through his negligence or that of his servants. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

26. **CARRIERS—Limitation of Value.**—A common carrier may make a valid contract of affreightment with a shipper embracing an actual and bona fide agreement as to the value of the property to be transported, and may thus limit his liability for loss to the amount agreed upon, but a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an arbitrary pread-

justment of the measure of damges, will not, though the shipper assents thereto in writing, serve to exempt the carrier from liability for the true value of the property shipped and lost or damaged through his negligence. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

27. **CARRIERS—Limitation of Value—Construction of Contract.**—When an issue of fact arises from the terms of a contract of affreightment as to whether there was an actual and bona fide valuation fixed on the property shipped, or whether there was simply an effort to limit liability arbitrarily, the question is one for the jury, but when the contract shows on its face that it arbitrarily limits the liability, there is no issue of fact, and it is for the court to construe the contract. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

Demurrage.

28. **CARRIER'S LIEN FOR DEMURRAGE.**—A common carrier has no lien, in the absence of express stipulation to that effect, on freight for demurrage for delay by the consignee in unloading at the point of destination, nor has the carrier any right to retain possession of such freight until demurrage is paid. (Pa. St.) Nicolette Lumber Co. v. People's Coal Co., 550.

29. **RAILROADS—Demurrage.**—A railroad company may lawfully charge storage or demurrage for its cars used and occupied by consignees beyond a reasonable time after the contract of transportation has been fulfilled, and the carrier has a lien for such demurrage charges on the property contained in the cars. (Ala.) Southern Railway Co. v. Lookwood Mfg. Co., 32.

30. **RAILROADS—Demurrage—Delivery.**—If a railroad company has placed a loaded car on its "team track" for the purpose of being unloaded by the consignee within a fixed time, this is not such an absolute and unqualified delivery of the contents of the car into the possession of the consignee as will cut off a future right of lien thereon for legitimate charges for car service or demurrage subsequently accruing through the failure of the consignee to unload the goods within the time fixed. (Ala.) Southern Ry. Co. v. Lookwood Mfg. Co., 32.

See Trover and Conversion.

CHATTEL MORTGAGE.

See Sales, 3-11.

CLOUD ON TITLE.

See Quieting Title.

COMMON LAW.

COMMON LAW of England—What Deemed to have been Adopted by American Statute.—The professed adoption of the common law of England does not require controlling effect to be given to that law as considered and understood prior to the Revolution. The terms "common law," as here employed, refer to that general system of law which prevails in England as distinguished from the Roman or civil law system, which was in force prior to the Louisiana purchase. Hence, the statute does not require adherence to the decisions of the common-law courts prior to the Revolution, in case the court considers subsequent decisions either in England or America better expositions of the principles of that system. (Neb.) Williams v. Miles, 431.

CONDITIONS.

1. **CONDITION PRECEDENT** are to be **Strictly complied with.** (Wyo.) Frank v. Stratford-Handcock, 963.

2. **A CONDITION PRECEDENT** is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. (Wyo.) Frank v. Stratford-Handcock, 963.

3. **CONDITIONS.—Whether a Condition is Precedent or Subsequent** depends upon the intent of the parties as collected from the whole contract, although certain words are customary where a condition rather than a covenant is intended. (Wyo.) Frank v. Stratford-Handcock, 963.

CONFESSIONS

See Criminal Law, 6, 7.

CONSPIRACY.

1. **CONSPIRACY.—A Conspiracy is an Agreement** or combination formed between two or more persons to do an unlawful act or to do a lawful act by unlawful means. (Ill.) Franklin Union No. 4 v. People, 248.

2. **CONSPIRACY.—A Combination may Amount** to a conspiracy, although its object is to do an act which would not be unlawful if done by an individual. (Ill.) Franklin Union No. 4 v. People, 248.

3. **CONSPIRACY.—An Agreement or Combination,** to constitute a conspiracy, need not be evidenced by a writing; it may be a verbal scheme or undertaking evidenced by the actions of the parties. (Ill.) Franklin Union No. 4 v. People, 248.

4. **CONSPIRACY.—Each Conspirator is Liable,** when a conspiracy has once been entered into, for all the acts of his co-conspirators done in furtherance of the objects of the conspiracy. (Ill.) Franklin Union No. 4 v. People, 248.

5. **CONSPIRACY—Evidence.—When a Conspiracy** is established, everything said, written, or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them, and may be proved against each. (Ill.) Franklin Union No. 4 v. People, 248.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—Special Acts.**—A statute authorizing a corporation to build a union depot does not violate a constitutional provision prohibiting the amending of charters by special act, by granting to several railroads such power and right, when such statute is enacted, under a concurrent resolution. (S. C.) Riley v. Charleston Union Station Co., 579.

2. **CONSTITUTIONAL LAW—Appropriations—Private Purpose.**—A statute appropriating the public money of the state for a private purpose and to pay a private debt is unconstitutional. (Wis.) State v. Houser, 824.

3. **CONSTITUTIONAL LAW—Appropriation—Private Purpose.**—A statute appropriating public money to a person who has furnished material to a contractor for a public building who has been paid by the state, but who has become insolvent before paying for such material, is unconstitutional. (Wis.) State v. Houser, 824.

See Insurance, 21, 22; Officers, 1; Statutes; Witnesses.

Note.
Constitutional Law, amusement, places of, municipal corporations, power of to license and regulate, 526.
amusement, places of, power of the legislature to regulate, 526.

CONTEMPT.

1. **CONTEMPT.—A Corporation may be Adjudged Guilty** of contempt in violating an injunction, and punished by a fine enforceable by a sequestration of its property. (Ill.) Franklin Union No. 4 v. People, 248.

2. **JUDGMENT—Obedience to Erroneous Order.**—The order of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. (Ill.) Franklin Union No. 4 v. People, 248.

3. **CONTEMPT by Labor Union in Violating Injunction.**—A labor union may be adjudged guilty of contempt for violating an injunction and be fined therefor. (Ill.) Franklin Union No. 4 v. People, 248.

4. **CONTEMPT—Manner of Setting Forth Charge.**—In proceedings for contempt committed out of the presence of the court, it may be brought to the attention of the court by an affidavit setting forth the facts. A petition is not necessary. But if a petition is filed for that purpose, it is sufficient, if it fully apprises the defendant of the charge against him, although it does not set out the charge with the particularity of an indictment. (Ill.) Franklin Union No. 4 v. People, 248.

5. **CONTEMPT—Order Adjudging Defendant Guilty.**—An order in contempt proceedings which refers to the petition and the affidavits filed in its support, and which in apt terms adjudges the defendant guilty of violating an injunction, setting out the manner of the violation, adjudging it to be a contempt, and imposing a fine, is sufficient. (Ill.) Franklin Union No. 4 v. People, 248.

6. **CONTEMPT.—On Appeal from an Order** adjudging persons guilty of a contempt, they cannot, in the absence of a certificate of the clerk that they have filed a complete record, raise the question that the recitals found in the several orders appealed from are not sufficient upon which to base a judgment of conviction. (Ill.) Franklin Union No. 4 v. People, 248.

7. **INJUNCTION—Error in Granting—Contempt in Violating.**—When a court has before it a party asking for an injunction, and the party against whom it is asked, upon a bill stating a case within its general equitable jurisdiction, the court has jurisdiction to determine whether an injunction should issue, and the character thereof; and if it errs in granting an injunction when none should issue, or in granting an injunction broader than the averments of the bill justify, such errors cannot be urged as a defense in proceedings for contempt in violating the injunction. (Ill.) Franklin Union No. 4 v. People, 248.

See Attorney and Client.

CONTRACTS.

In General.

1. **INSTRUMENTS in Blank, Re-execution not Necessary.**—In case of implied authority, in the circumstances stated in the foregoing propositions, being performed the instrument does not require re-execution or acknowledgment to give it full validity. (Wis.) Friend v. Yahr, 924.

2. **CONTRACT Between Two Persons for the Benefit of a Third.**—An agreement made by one person with another for the benefit of

a third is binding, regardless of the relations between such other and the third person. Upon the making of the agreement between such person and such other, the law, operating upon the acts of the parties, creates the essential privity between such other and the third person necessary to a binding contract between them. (Wis.) Smith v. Pfluger, 911.

3. **AGREEMENT to Pay the Debt of Another.**—Where one, on a consideration moving to him from another, agrees to pay the latter's debt to a third person, such as an agreement by a grantee of real property that he will pay the indebtedness of his grantor secured upon such property as the consideration in whole or in part for the conveyance, the promisor becomes absolutely bound to the third person, regardless of whether he has knowledge of the matter or renders any consideration for his new security. (Wis.) Fanning v. Murphy, 946.

4. **RIGHTS of One Whose Debt a Third Person has Agreed to Pay.**—Where a person, upon a sufficient consideration from another to him, agrees to pay a debt due from the latter to a third person, the relation between the promisor and such third person becomes that of principal and surety, so that, in the event of the third person paying the debt, he has a remedy against the principal. (Wis.) Fanning v. Murphy, 946.

5. **DUTY of One Whose Debt a Third Person has Agreed to Pay.**—When, upon a sufficient consideration, one party to a contract agrees to pay the debt of another to a third person, the latter becomes bound to treat his original debtor as though his liability were that of a surety only, and hence not to do any act which would discharge a surety, as, for instance, extending the time for the payment of the indebtedness. (Wis.) Fanning v. Murphy, 946.

6. **CONTRACTS Contrary to the Statutes and the Law of a State** will not be enforced by its courts. (Wis.) Presbyterian Ministers' Fund v. Thomas, 919.

Building Contracts.

7. **BUILDING CONTRACTS—Total Destruction of Building.**—If complete performance of an entire contract to do work upon another's building is prevented by the total destruction of such building, such completion is excused, and the contractor may recover pay at the contract price for the portion of the work done. (Wis.) Halsey v. Waukesha Springs etc. Co., 838.

8. **BUILDING CONTRACTS—Architect's Certificates.**—An agreement that an architect's certificate shall be a condition precedent to a contractor's right to payment is valid, but is always deemed to embody the condition that the architect shall exercise his function as arbitrator in good faith. (Wis.) Halsey v. Waukesha Springs etc. Co., 838.

9. **BUILDING CONTRACTS — Architect's Certificate.**—One who performs his contract to build may recover his pay therefor notwithstanding an agreement that an architect's certificate shall be a condition precedent to payment if it appears that he is disabled from obtaining such certificate by collusive, fraudulent, arbitrary, or unreasonable refusal by such architect. (Wis.) Halsey v. Waukesha Springs etc. Co., 838.

Contracts by Telegraph.

10. **CONTRACTS by Telegraph—Statute of Frauds.**—A contract for the sale of lands may be made by means of telegrams, and if they

refer and directly relate to one another, so as to fairly constitute one paper, and are signed by the parties or their agents, and it appears from them that the minds of the parties met and that the terms of the contract clearly appear, this is a sufficient compliance with the statute of frauds. (W. Va.) Cobb v. Glenn Boom & Lumber Co., 734.

See Husband and Wife, 1.

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CONTRIBUTION.

See Principal and Surety.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.

In General.

1. **CORPORATIONS — Mortgage Executed by Officer Alone.**—If an officer in a corporation is intrusted by it with the performance of the entire functions of the corporation, such as are usually performed by a board of directors, it being entirely inactive, and this has become a settled policy, his act in executing a mortgage on its personal property in its name and behalf, acquiesced in by all of the directors and stockholders, is binding against the corporation and its subsequent creditor, who obtained a lien by suing out a distress warrant for rent accruing long after the making and recording of the mortgage and with full knowledge of it. (Ga.) Garmany v. Lawton, 207.

2. **CORPORATIONS—Contract by Telegrams—Power of Officer.**—The secretary of a corporation has no power by virtue of his office alone to make a contract for the sale of the lands of the corporation, and if he makes such sale by means of telegrams, the corporation is not liable thereunder unless he had, at the time, express authority to make such sale, or was held out by the corporation in such a way as to make it apparent that he had such authority, or unless the contract of sale was ratified by the corporation. (W. Va.) Cobb v. Glenn Boom & Lumber Co., 734.

3. **CORPORATIONS—Parol Evidence of Transactions.**—If it appears that a corporation has kept no minute-books, stock-book, corporate seal, or record of its transactions, parol evidence of such transactions is admissible as against the objection that the books are the best evidence. (Ga.) Garmany v. Lawton, 207.

Organization and Meetings.

4. **CORPORATION—Defective Formation — Liability of Officers.** Proof of a corporation de facto does not relieve the officers and directors of the corporation from the liability imposed by the incorporation act of Illinois when its terms are not complied with. To escape that liability, there must be a corporation de jure. (Ill.) Butler Paper Co. v. Cleveland, 230.

5. **CORPORATION — Organization—Mandatory Statutes.**—A failure substantially to comply with mandatory statutory provisions in the organization of a corporation prevents the corporation from becoming one de jure, but a failure to comply with merely directory provisions does not have this effect. (Ill.) Butler Paper Co. v. Cleveland, 230.

6. **CORPORATION — Organization—Notice of First Meeting.**—The provisions of the incorporation act of Illinois that notice of the meeting to elect directors "shall" be given by mail to subscribers of stock is directory merely, and, if they all agree thereto, may be waived. (Ill.) Butler Paper Co. v. Cleveland, 230.

7. **CORPORATION—Notice of Meeting—Filing with Secretary of State.**—The requirement of the incorporation act of Illinois that a copy of the notice of the meeting to elect directors shall be included in the report to the Secretary of State does not make mandatory a further requirement of the statute that notice of such meeting shall be given by mail to subscribers of stock, and it may be satisfied by including the report of a written instrument signed by all subscribers in which such notice is waived. (Ill.) Butler Paper Co. v. Cleveland, 230.

8. **CORPORATION—Meetings — Statutory Notice.**—If the persons entitled to notice of a corporate meeting actually attend it and participate in the business there transacted, it is immaterial whether

the notice was given in the manner prescribed by statute. (Ill.) Butler Paper Co. v. Cleveland, 230.

Stock Subscriptions.

9. **CORPORATIONS.—Liability to Pay Stock Subscriptions** in a corporation can only be rightfully satisfied as to a stockholder not consenting by payment according to the subscription contract. (Wis.) Theis v. Dun, 880.

Reduction of Stock.

10. **CORPORATIONS.—Reduction of Authorized and Subscribed for Capital Stock** in a corporation can only be accomplished by voluntary surrender by subscribers pro rata, or by some method which will not prefer one stockholder over another. (Wis.) Theis v. Dun, 880.

11. **CORPORATIONS.—Corporate Power to Reduce Stock** authorized and subscribed for does not authorize an arbitrary cancellation of stock, or cancellation of a subscription liability for stock, without in some proper manner treating all stockholders with like favor. (Wis.) Theis v. Dun, 880.

12. **CORPORATIONS — Fraudulent Reduction of Capital Stock—Equity Jurisdiction.**—If authority to reduce authorized capital stock in a corporation is in form exercised by it for the wrongful purpose of creating a basis for favoring the majority of the stockholders at the expense of the minority, a court of equity will interfere on behalf of the latter and declare the transaction void. (Wis.) Theis v. Dun, 880.

13. **CORPORATIONS.**—Authority to reduce capital stock is limited by its purposes, and when it is exercised clearly for an illegitimate purpose, especially when such purpose is fraudulent, the act is void. (Wis.) Theis v. Dun, 880.

Equity Jurisdiction to Revise Corporate Action.

14. **CORPORATIONS—Equity Jurisdiction to Revise Corporate Action.**—A court of equity has no jurisdiction to supervise or revise corporate action where there is no bad faith in the matter, but only error of judgment. In such matters the members of a corporation, as to authority lodged with them, and the board of directors in the field, where that is the governing body, are supreme within the limits of honest administration, and of the boundaries of discretion. (Wis.) Theis v. Dun, 880.

15. **CORPORATIONS—Equity Jurisdiction to Revise Corporate Action.**—If the act of a corporation, or its governing body, though lawful in itself, is designed to accomplish some illegitimate object, and the result, if permitted to operate, will be injurious to the corporation or its members not concerned in the transaction, they may successfully invoke equity jurisdiction for the protection of the corporation where the proper officers will not act. (Wis.) Theis v. Dun, 880.

16. **CORPORATION—Abuse of Power.**—If stockholders in a corporation, by combining a ruling majority, exercise a corporate power with bad motive, to the pecuniary loss or prejudice of the corporation and outside stockholders, the wrongful use of power together with the consequences thereof are open to judicial investigation and redress. (Wis.) Theis v. Dun, 880.

17. **CORPORATIONS—Abuse of Power—Equity Jurisdiction.**—Abuse of power to the direct or indirect injury of stockholders in a corporation, as well as usurpation of power with like effect, is a sub-

ject that may be dealt with by courts and by the remedies which equity affords when there is no other remedy which is reasonably effective. (Wis.) Theis v. Dun, 880.

See Receivers; Contempt.

COUNTY BONDS.

See Bonds.

COURTS.

COURTS.—The Jurisdiction of a Court does not Depend upon the correctness of its order; jurisdiction is not lost by entering a decree, however erroneous. (Ill.) Franklin Union No. 4 v. People, 248.

COVENANTS.

1. COVENANTS—Seal.—A written instrument creating and containing a covenant need not be under seal. (Ga.) Atlanta etc. Ry. Co. v. McKinney, 215.

2. COVENANTS—Construction.—Covenants are to be so construed as to carry into effect the intention of the parties as collected from the whole instrument, and from the circumstances surrounding its execution. (Ga.) Atlanta etc. Ry. Co. v. McKinney, 215.

3. COVENANTS—Persons Bound.—If lands were conveyed by indenture to a person who does not sign the deed, but who enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in such deed. (Ga.) Atlanta etc. Ry. Co. v. McKinney, 215.

4. COVENANTS Running with Land—Covenant to Supply Water.—If the purchaser of water rights upon land covenants with his vendor to carry and convey sufficient water to the residence of the latter for the ample use and accommodation of such residence and its occupants, such covenant runs with the land and binds the successor in title of the covenantor. (Ga.) Atlanta etc. Ry. Co. v. McKinney, 215.

5. COVENANTS—Statute of Limitations.—Upon a covenant running with the land, contained in a deed not signed by the covenantor, the statute of limitations begins to run from the time of its breach, and an action therefor is barred at the end of six years thereafter. (Ga.) Atlanta etc. Ry. Co. v. McKinney, 215.

CRIMINAL LAW.

In General.

1. CRIMINAL LAW—Committing Magistrates—Statutory Construction.—The provision of the Utah statutes conferring jurisdiction on the judges of city courts to act as committing magistrates is not in conflict with a constitutional provision that "the judges of the supreme court, district courts and justices of the peace shall be conservators of the peace and may hold preliminary examinations in cases of felony." (Utah) State v. Shockley, 639.

2. CRIMINAL LAW—Evidence of Other Offenses—Part of Same Transactions.—Where a person who attacked two companions is on trial for killing one of them, it is proper to refer to his shooting at the other during the affray, to show his state of mind and his "abandoned and malignant heart." (Utah) State v. Shockley, 639.

Principal and Accessary.

3. **PRINCIPAL AND ACCESSARY.**—An accessary before or after the fact may be indicted separately from the principal either before or after the conviction of the latter. If before, the indictment must aver the principal's guilt; if after, it may allege either the guilt of the principal, or that he has been convicted without averring his guilt. (Fla.) Daughtrey v. State, 84.

4. **PRINCIPAL AND ACCESSARY.**—The conviction of the principal is an essential prerequisite, except in certain cases, to the punishment of the accessary, and the conviction required includes a judgment of conviction, and not merely the verdict of a jury. (Fla.) Daughtrey v. State, 84.

5. **PRINCIPAL AND ACCESSARY.**—An Indictment against an accessary which fails to allege the guilt of the principal, and which merely alleges that he was duly convicted by a jury, is fatally defective, in failing to allege a judgment of conviction against the principal. (Fla.) Daughtrey v. State, 84.

Confessions.

6. **CRIMINAL LAW—Confessions as Evidence.**—If a confession has once been obtained through illegal influence, it must be clearly shown that such influence has been removed before a subsequent confession can be received in evidence. (Fla.) McNish v. State, 65.

7. **CRIMINAL LAW—Evidence—Confession by Plea of Guilty.**—A plea of guilty before a committing magistrate is not admissible in evidence as a voluntary confession, if the defendant was not warned that such plea might be used against him. This is especially true when the examination was held amidst excitement and under threats against the life of the defendant. (Fla.) McNish v. State, 65.

See Penalties; Witnesses.

Note.

Criminal Law, municipal corporations, power of to punish acts already made criminal by the general laws, 149-157.
See Municipal Corporations.

CROPS.

See Husband and Wife, 4, 5.

DAMAGES.

1. **DAMAGES—Measure of Interest.**—If, for damages arising from the destruction of property, there is a basis of calculation as to the value, interest is not recoverable eo nomine. The jury may, however, consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may in their discretion increase the amount of damages by adding to the value of the property destroyed a sum equal to the interest on such value, the entire sum found being returned as damages, and not exceeding the sum sued for. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

2. **NEGLIGENCE—Damages.**—If, in an action to recover damages for personal injury caused by negligence, there is an entire absence of any evidence tending to authorize the infliction of punitive damages, the court should instruct the jury that no such damages should be allowed, and it is error to refuse to so instruct. (Fla.) Florida Central etc. R. R. Co. v. Mooney, 73.

DEATH.

NEGLIGENCE—Death by Wrongful Act—Action by Mother of Bastard Child.—If a parent is given a right of action for the death of a child caused by wrongful act, the mother, as such parent, cannot recover for the death of her illegitimate child, caused by the negligence of another. (S. C.) McDonald v. Southern Railway, 576.

See Death.

DEEDS.

In General.

1. **DEEDS—Seal.**—A seal is not an essential requisite of a deed. (Ga.) Atlanta etc. Ry. Co. v. McKinney, 215.

2. **DEEDS—Description—Parol Evidence to Aid.**—If a tax deed describes the land conveyed simply as being in a township, section, and range of a certain county, but fails to describe whether the township is north or south, or whether the range is east or west, but does recite the advertisement of the lands for sale to pay taxes due from the owner thereof, naming him, parol evidence is admissible to aid the description contained in the deed and to show what land was intended to be embraced, and such deed is then admissible to show color of title. (Ala.) Brannon v. Henry, 55.

3. **DURESS, Avoiding Deed Procured by.**—If a deed is procured by duress, it may be avoided by entry by the grantor or his heirs within the statutory period of limitation. (Neb.) Hovorka v. Havlik, 387.

Reservations and Exceptions.

4. **DEEDS — Construction—Exception and Reservation.**—A deed which expressly excepts and reserves "a strip of land two rods in width off the north side thereof" plainly imports that the fee was intended to be reserved. (Wis.) Pritchard v. Lewis, 873.

5. **DEEDS — Construction— "Reservation"—"Exception."**—The term "reservation" as used in a deed means something taken back from the thing granted, while the term "exception," when so used, means some part of the estate not granted. (Wis.) Pritchard v. Lewis, 873.

6. **DEEDS — Construction — Reservation—Exception.**—A reservation in a deed for a right of way carries only an easement, while an exception for the same purpose excludes the fee from the grant. (Wis.) Pritchard v. Lewis, 873.

7. **DEEDS—Construction—Exception or Reservation—Evidence to Determine.**—If, from the words of a deed, it is doubtful whether it creates an exception or a reservation, that question is one largely of intention to be determined by the court from the nature and effect of the provision itself, the subject matter and the situation of the parties, and evidence is admissible to aid the court in removing any existing ambiguity. (Wis.) Pritchard v. Lewis, 873.

8. **DEEDS — Exception—Adverse Possession.**—If all of a tract of land is granted "excepting" a strip containing one acre for a right of way for another, with the privilege in the grantee to fence such one acre into his inclosure and maintain gates, the occupation of the whole tract by a subsequent grantee in partition under a deed conveying and describing the property by metes and bounds and including the whole tract is not adverse as to the one acre strip inclosed with the remainder of the tract. (Wis.) Pritchard v. Lewis, 873.

Deed of Gift.

9. **DEED OF GIFT—Sufficiency of Delivery—Failure to Record.**—Where the grantor in a deed delivers it to the grantee, and she hands it to her brother, asking him to take care of it, and he puts it in his safe without recording it, the delivery is complete. (Mich.) Fischer v. Union Trust Co., 329.

10. **DEED OF GIFT—Grantor's Covenant to Pay Mortgage.**—Where a father by warranty deed conveys land to his daughter, the only consideration therefor being love and affection, and the deed covenants against all encumbrances excepting two mortgages which he "agrees to pay when due," his agreement is not enforceable for want of consideration, and if he fails to pay the mortgages in consequence of which they are foreclosed, she has no claim for damages against his estate after his death. (Mich.) Fischer v. Union Trust Co., 329.

See Conditions; Covenants.

DEMURRAGE.

See Carriers, 28-30.

DIVORCE.

In General.

1. **DIVORCE.**—Personal service of complaint and summons in divorce proceedings may be legally made outside the state. (Minn.) Sodini v. Sodini, 371.

2. **DIVORCE—Alimony to Defendant in a Suit to Annul a Marriage.**—In an action to annul a marriage, the defendant may secure a divorce on the ground of adultery and cruel and inhuman conduct, and therefore the court may award defendant temporary alimony therein. (Minn.) Sodini v. Sodini, 371.

Default Judgment.

3. **JUDGMENTS by Default in Divorce—Collateral Attack.**—A default judgment in divorce proceedings before a court of competent jurisdiction is no more subject to collateral attack than any other judgment. (Minn.) Sodini v. Sodini, 371.

4. **JUDGMENTS by Default in Divorce—Collateral Attack—Return.**—If the language of the return of service of the summons and complaint in a proceeding for divorce resulting in a judgment by default fairly admits of an interpretation which will make such return legal and sufficient, it should be so construed upon collateral attack. (Minn.) Sodini v. Sodini, 371.

5. **DIVORCE—Default Judgment—Return.**—If the return upon which a default judgment in divorce is based shows that the summons and complaint were properly and personally served on the defendant, it is immaterial that the officer making the service also certified that the name by which the defendant was described in such papers was not his true name, but an alias. (Minn.) Sodini v. Sodini, 371.

Custody of Children.

6. **DIVORCE—Custody of Child—Former Judgment.**—In an action by a husband and against his wife for a divorce brought subsequently to habeas corpus proceedings in which the custody of their infant child was awarded to her, he must, to entitle him to have the judgment in the habeas corpus proceeding annulled and regain the custody of such child, allege facts occurring subsequently to such judgment or

unknown at the time it was rendered, which, if shown to be true, would warrant the court, in view of the welfare of the child, in awarding the custody to him. (W. Va.) Dawson v. Dawson, 800.

7. **DIVORCE—Custody of Child.**—If a father suing for divorce is claiming the custody of a child of the marriage, the court will exercise its discretion according to the facts and what appears to be for the best interest of the child. The welfare of the child is the controlling consideration in awarding its custody to either parent. (W. Va.) Dawson v. Dawson, 800.

8. **DIVORCE—Custody of Child.**—If the father and mother have separated and their infant children must of necessity be deprived of the care, protection and training of one of them, then it is the duty of the court to confide the custody of such children to that parent, whether father or mother, best suited to maintain, protect and educate them and bring them up in moral courses. (W. Va.) Dawson v. Dawson, 800.

DURESS.

See Deeds, 3.

EJECTMENT.

1. **EJECTMENT.—Possession Alone is sufficient to maintain** an action to determine adverse claims to land, and is available as a defense in an action of ejectment against a plaintiff, who produces no competent evidence of title against the person so in possession. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

2. **IN EJECTMENT the Plaintiff Must Stand on His Legal Title.** (Wis.) Pereles v. Gross, 901.

3. **IN EJECTMENT the Legal Title is all that is in issue.** (Wyo.) Matthews v. Nefsy, 1020.

4. **EJECTMENT Based on Sheriff's Deed.**—To authorize a recovery on a sheriff's deed in an action of ejectment, there must be a valid judgment, execution, levy, sale and deed, and the plaintiff must also show that the judgment defendant under whom he claims had an estate or interest in the lands which was subject to levy and sale. (Ala.) Carter v. Smith, 36.

5. **EJECTMENT — Purchaser of Equity of Redemption.**—As against the mortgagor, the purchaser of the equity of redemption at sheriff's sale may maintain ejectment, and the mortgagor is not permitted to set up an outstanding title in the mortgagee to defeat the action. Such action cannot be maintained against the mortgagee. (Ala.) Carter v. Smith, 36.

6. **EJECTMENT—Evidence.**—In an action of ejectment by a purchaser at sheriff's sale against one claiming under a mortgage, evidence is admissible to show that whatever title the defendant in execution had it passed from him before the levy and sheriff's sale under the execution, and this although the mortgage was assigned to a third person after the suit was commenced which culminated in the judgment upon which the execution issued. (Ala.) Carter v. Smith, 36.

7. **EJECTMENT—Color of Title—Evidence.**—A deed void because of an indefinite and uncertain description does not amount to color of title. Hence possession under it is limited to possessio pedis. (Ala.) Brannon v. Henry, 55.

8. **EJECTMENT—Color of Title.**—A tax deed though void as a muniment of title, is admissible in evidence to show color of title,

unless it is void because of the uncertainty and indefiniteness of description. (Ala.) Brannon v. Henry, 55.

9. **EJECTMENT—Color of Title.**—If a deed is offered in evidence to show color of title in ejectment, it is not necessary that its execution should be proved. (Ala.) Brannon v. Henry, 55.

10. **EJECTMENT—Evidence.**—In ejectment evidence that the defendant purchased the land from the state, paid therefor, and went into possession thereof, and has been in possession ever since, is relevant as tending to show the nature and character of his possession and his bona fide claim of purchase. (Ala.) Brannon v. Henry, 55.

11. **EJECTMENT—Evidence.**—Defendant in an action of ejectment, cannot be permitted, when testifying, to look at the deed under which he claims and state the township and range in which the land is actually located, when such description is not contained in the deed. (Ala.) Brannon v. Henry, 55.

12. **EJECTMENT—Evidence.**—In an action of ejectment, a question inquiring of defendant how much land he purchased in a certain section is objectionable, as assuming that he bought land in that section. (Ala.) Brannon v. Henry, 55.

13. **EJECTMENT—Burden of Proof.**—In ejectment, plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant, and the burden of proof is upon the plaintiff to establish his title. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

ELECTION OF REMEDIES.

1. **REMEDIES, Election of.**—If the purchasers of a horse, who have given a note for part of the purchase price, commence an action against their vendors to recover damages for a breach of warranty in the sale of the horse, without returning or offering to return it, this is an irrevocable election of remedies precluding them from afterward defending an action on such note on the ground that there was no sale, or that the sale had been rescinded. (Wis.) Davis v. Schmidt, 938.

2. **REMEDIES, Election of, Doctrine of is Applicable Against a Defendant.**—The defendant may be precluded from maintaining a defense pleaded by him on the ground that by an election of remedies made by him in commencing a prior action against the plaintiff, the defendant had deprived himself of such defense. (Wis.) Davis v. Schmidt, 938.

3. **REMEDIES, Election of not Avoided by Amending the Complaint.**—If plaintiff, by commencing an action and filing his complaint, has elected his remedy, he cannot avoid the effect of the election by the subsequent amendment of his complaint. (Wis.) Davis v. Schmidt, 938.

EMBEZZLEMENT.

EMBEZZLEMENT—Indictment—Proof of Ownership.—In a prosecution for embezzlement the ownership of the property embezzled must be laid in the indictment and proved with the same particularity as in larceny, but the proof is sufficient if it shows a qualified or special property in the person alleged to be the owner. (Fla.) Meacham v. State, 61.

EMINENT DOMAIN.

In General.

1. CONSTITUTIONAL LAW—Eminent Domain.—A statute granting to a corporation the right to condemn lands for a certain public use is not unconstitutional as depriving the person whose property is condemned of his property without due process of law and without just compensation, in that it does not provide some tribunal to determine any question made by land owners as to the right of the corporation to condemn lands. (S. C.) Riley v. Charleston Union Station Co., 579.

2. EMINENT DOMAIN—Defenses.—If it is sought to enjoin the condemnation of land authorized by statute, the fact that the person whose land is sought to be condemned was not given personal notice of the introduction in the legislature of the bill authorizing such condemnation is immaterial. (S. C.) Riley v. Charleston Union Station Co., 579.

3. EMINENT DOMAIN — Necessity — Question of Law.—The question whether a particular parcel of land is necessarily required to be condemned for railroad purposes is for the courts. (S. C.) Riley v. Charleston Union Station Co., 579.

4. EMINENT DOMAIN—Property Subject to Condemnation.—If a corporation is formed to erect a union depot, with power to condemn land, and it owns no property which may be used for that purpose, it is no abuse of its discretion that it seeks to condemn certain land, for the purpose named without attempting to use the land of certain of its stockholders which might be adapted to the purpose of the depot. (S. C.) Riley v. Charleston Union Station Co., 579.

Public Use.

5. EMINENT DOMAIN—Constitutional Law.—A statute authorizing a corporation to condemn lands for union depot purposes authorized such condemnation for a public use, and is therefore constitutional. (S. C.) Riley v. Charleston Union Station Co., 579.

6. EMINENT DOMAIN—Constitutional Law.—A corporation organized under statutory authority to erect a union passenger depot, and to condemn lands therefor, is organized for the public use, and its acts, if regular, are valid, and the fact that railroad companies, who are stockholders and whose officers are officers in such corporation and own sites suitable for such depot station, is immaterial. (S. C.) Riley v. Charleston Union Station Co., 579.

7. EMINENT DOMAIN—Public Use.—The question whether a use is public depends upon the nature of the use, and not upon the possessions of the particular individuals or corporations that may be interested in such use. (S. C.) Riley v. Charleston Union Station Co., 579.

Damages and Compensation.

8. EMINENT DOMAIN—Damages.—In all cases where property is taken in an exercise of the right of eminent domain, except where the right to compensation is disputed, or where the owner has not actively or constructively permitted the entry for construction purposes, the remedy afforded by the condemnation statute is exclusive. (S. C.) Johnson v. Southern Railway, 572.

9. EMINENT DOMAIN—Damages—Smoke and Noise.—If a railway company enters land by permission, or without dispute as to the right of the land owner to compensation, and erects an embankment with due care, but so near a dwelling-house that trains operated with

due care fill such house with noise, smoke, and cinders, the land owner cannot recover damages therefor in a separate action, as his damages are included in the compensation given by the condemnation proceedings. (S. C.) Johnson v. Southern Railway, 572.

10. **EMINENT DOMAIN—Damages—Surface Water.**—If surface water is thrown back on land by a railroad embankment constructed with due care, the resulting damages are included in the compensation received in the condemnation proceedings. (S. C.) Johnson v. Southern Railway, 572.

11. **EMINENT DOMAIN—Measure of Compensation.**—If, in condemnation proceedings, the whole of a lot of land is sought to be taken. the compensation due the owner is its market value at the time of its appropriation, without any deduction for benefits or appreciation in value, general and common to the community in which the land is situated, and due to the contemplated improvement for which the land is taken. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

12. **EMINENT DOMAIN—Measure of Compensation.**—In assessing the compensation to be made for land taken under the right of eminent domain, its value at the time of the condemnation must be considered, and the owner is entitled to the benefit of an advance caused by the prospective improvement. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

13. **EMINENT DOMAIN—Compensation — Market Value.**—The market value of land to which the owner is entitled in condemnation proceedings is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell, and is bought by one who wishes to buy, but who is under no necessity of having it. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

14. **EMINENT DOMAIN.—Market Value** of land in condemnation proceedings is to be determined by the availability of the land for all valuable uses to which it is adapted, having regard to the business and wants of the community, or such as may be reasonably expected in the immediate future. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

15. **EMINENT DOMAIN.—Market Value of Land** in condemnation proceedings is not a value fixed by concensus of opinion in the community in which the land is situated, or among business men or dealers in real estate who are familiar with it, but such value is to be fixed by the jury upon consideration of all the evidence in the case, including the knowledge of the property, which the jury have acquired by a view of it. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

16. **EMINENT DOMAIN—Evidence of Value—Purchase Price.**—In condemnation proceedings, the price paid for the land by its owner is admissible in evidence as to its value, if not too remote in time. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

17. **EMINENT DOMAIN—Evidence of Value of Land.**—In condemnation proceedings, the opinions of persons residing near the land who have known it for a long time, though not real estate dealers, nor especially informed as to prices, are admissible in evidence on the question of its market value. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENTIRETIES.

See Husband and Wife, 4, 5.

EQUITY.

1. **EQUITY—Judgment at Law as a Bar.**—A defendant in a suit at law having only a purely equitable defense to the cause of action is not barred of his equity by the mere fact that he defers filing his bill until judgment has been entered against him at law. Such delay in seeking equitable relief is not laches. (Ala.) Humphries v. Adkins, 42.

2. **EQUITY PRACTICE.**—On a hearing upon bill, answer, and replication, after the time for taking testimony had expired, every allegation in the answer responsive to the bill is taken to be true. (Fla.) Ropes v. Jenerson, 79.

3. **EQUITY PRACTICE.**—If one seeks to set aside a conveyance of land as fraudulent, and rests his equity upon the vacant character of the land, an answer under oath that defendant is in possession of the land is responsive to the bill, and, in the absence of evidence, establishes that the land is occupied adversely. (Fla.) Ropes v. Jenerson, 79.

4. **EQUITY—Erroneous Judgment.**—Upon a hearing of a bill in equity, and after ascertaining that there is no equity in such bill, it is error to entertain a decree adjudging the title to the land in controversy to be in the defendant, and to be his homestead. In such case the bill should be dismissed without more. (Fla.) Ropes v. Jenerson, 79.

5. **PLEADING.—The Want of Capacity to File a Bill** in chancery by a voluntary association must be taken advantage of by demurrer or plea, otherwise the defect is waived and the question cannot be raised in the supreme court on appeal. (Ill.) Franklin Union No. 4 v. People, 248.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

ESTOPPEL IN PAIS in Favor of Mortgagee, When does not Protect Purchaser at a Foreclosure Sale.—Though a mortgagor may, as against his mortgagee, have estopped himself from denying that the mortgaged premises included a certain building, this estoppel will not avail a purchaser at a sale under such mortgage who was not misled at the time of his purchase in supposing that the land bid for or the deed he received included anything except the land described in such deed. (Wis.) Pereles v. Gross, 901.

EVIDENCE.

In General.

1. **EVIDENCE—Part of Conversation.**—A witness may testify to what he heard said in a conversation between other persons, even if it is not shown that he heard the whole of such conversation. (Fla.) Meacham v. State, 61.

2. **EVIDENCE.—Letters** written by a witness to the opposite party to the litigation, concerning the subject matter thereof, and tending to discredit such witness' testimony, are admissible in evidence. (Fla.) Florida Central etc. R. R. Co. v. Mooney, 73.

3. **EVIDENCE—Conversation Through Interpreter.**—If two persons, who cannot understand each other, converse through an interpreter, the words of the latter, which are their necessary medium of communication, are adopted by both, and made part of their

conversation, as much as those which fall from their own lips, and the interpretation, under such circumstances, is prima facie to be deemed correct. In such case either person or a third person, who hears the conversation, may testify to it as he understands it, although for his understanding of what was said by one of the parties he is dependent on the interpretation which was a part of the conversation. The fact that such conversation was had through an interpreter affects the weight, but not the competency, of the evidence. (Fla.) Meacham v. State, 61.

4. **EVIDENCE—Telegrams.**—Whether a copy of a telegram or the original is sought to be introduced in evidence it is necessary that its genuineness and that it was written and sent by the person whose name it bears be shown, before it becomes competent evidence. (W. Va.) Cobb v. Glenn Boom & Lumber Co., 734.

Res Gestae.

5. **EVIDENCE—Res Gestae.—Declarations and Acts** sought to be introduced in evidence as part of the res gestae must be connected with or grow out of the main transaction which is the subject matter of litigation, and must tend to explain and elucidate it. (Utah) Leach v. Oregon Short Line R. R. Co., 708.

6. **EVIDENCE—Res Gestae.—In an Action Against a Railroad Company** for the death of a brakeman who was knocked from a moving train by a bridge, an exclamation made by the conductor to another brakeman a few seconds after the accident while giving orders in respect thereto: "My God! Go back and see if you can find Leach. The bridge knocked him off"—is admissible as part of the res gestae. (Utah) Leach v. Oregon Short Line R. R. Co., 708.

See Criminal Law; Judgments, 5-8.

Note.

Evidence, telegrams as evidence in criminal cases, 770.
telegrams, as notice in civil proceedings, 771.
telegrams, authenticity of, how may be proved, 765.
telegrams, authenticity of reply telegrams, how may be proved, 766.
telegrams, authority of agents to send must be established, 765.
telegrams, original, loss of, when sufficiently proved, 769.
telegrams, original, necessity for proving, 768.
telegrams, original, notice to produce, necessity for, 769.
telegrams, presumption of the authenticity of reply telegrams, 766.
telegrams, presumption of their reaching their destination, 766, 767.
telegrams, proof of, 764.
telegrams, secondary evidence of, 768.
telegrams, secondary evidence of, foundation for, 768, 769.
telegrams, when admissible in, 764.

EXCEPTIONS AND RESERVATIONS.

See Deeds, 4-8.

EXECUTIONS.

In General.

1. **FORTHCOMING BONDS—Issues.**—In a suit on a forthcoming bond given by a claimant, where its execution is not denied, the only issue to be decided is whether or not there has been a breach

of the bond. Neither the legality of the levy nor the authority of the officer to make it is an issuable fact in such suit. (Ga.) Oliver v. Warren, 188.

2. EXECUTION SALES—Action by Purchaser to Set Aside Prior Conveyance.—A court of equity cannot entertain a suit by a purchaser of land at execution sale, who is not in possession, against a person who is in possession, to set aside a prior conveyance made by the judgment debtor, as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors. The complainant's remedy is at law only. (Fla.) Ropes v. Jenerson, 79.

Exemption of Railroad Property.

3. EXECUTIONS—Exempt Property of Railroads.—The property of a railroad company necessary to enable it to perform its duties to the public is not subject to seizure and sale under execution. (Pa. St.) Margo v. Pennsylvania R. R. Co., 559.

4. EXECUTIONS—Exempt Railroad Property.—Railroad property essential and necessary to its existence and in actual use cannot be seized and sold under an ordinary writ of execution. (Pa. St.) Margo v. Pennsylvania R. R. Co., 559.

5. EXECUTIONS — Railroads — Exempt Property. — Materials owned by a railroad company and used by it for the repair of its bridges, tracks, sidings, and other like emergency purposes cannot be levied on and sold under an ordinary execution. (Pa. St.) Margo v. Pennsylvania R. R. Co., 559.

Note.

Execution Sale, fraudulent transfers, power of equity to cancel at the suit of a purchaser at, 81-84.

EXECUTORS AND ADMINISTRATORS.

In General.

1. EXECUTORS AND ADMINISTRATORS — Appointment of Public Administrator Without Notice.—Under a statute providing that "when any person shall die intestate, leaving property in this state, but leaving no widow, surviving husband, or next of kin," the county court having jurisdiction may, upon its own motion, or upon the application of the public administrator, grant administration of such estate, the appointment of the public administrator may properly be made without notice. (Wis.) Jordan v. Chicago etc. R. R. Co., 865.

2. JUDGMENTS — Estate of Decedents — Collateral Attack.—Under a statute providing that when any person shall die intestate leaving property within the state, but leaving no widow, surviving husband, or next of kin, the county court having jurisdiction shall grant administration to the public administrator, such court, on petition filed for the appointment, has jurisdiction to determine whether the deceased leaves any property within the state, and its determination cannot be collaterally attacked. (Wis.) Jordan v. Chicago etc. R. R. Co., 865.

3. JUDGMENTS — Collateral Attack—Estates of Decedents.—A county court, upon petition filed for administration, upon an intestate's estate, has jurisdiction to determine whether the deceased left any property within the state, and having such jurisdiction of the subject matter in such proceeding in rem, its determination cannot properly be treated as a nullity, nor is it open to collateral attack, even if erroneous. (Wis.) Jordan v. Chicago etc. R. R. Co., 865.

4. EXECUTORS AND ADMINISTRATORS — Attorney for Purchase by.—An attorney for an administrator of an estate has no

right to purchase an outstanding life estate in real property of which such administrator is trustee, when such purchase is made for the personal use of such attorney, and to make a profit by the sale of the land, and the administrator must account to the estate for the amount realized as profit from such sale. (Minn.) Turner v. Fryberger, 395.

5. **REAL ESTATE, Contracts for the Purchase and Sale of by Administrators.**—The interest of the estate of a decedent in an executory contract for the purchase of lands cannot be sold by the administrator except as real estate, and after an order of court authorizing him to make the sale. (Neb.) Hovorka v. Havlik, 387.

6. **EXECUTOR—Removal by Supreme Court.**—The supreme court of Wyoming has no original jurisdiction in the matter of the removal or suspension of executors; its jurisdiction is purely appellate. (Wyo.) Hecht v. Carey, 981.

Nonresident Executor.

7. **EXECUTOR.—A Nonresident of the State** in which a will is admitted to probate . . in the absence of a controlling statute, qualify and act as executor. (Wyo.) Hecht v. Carey, 981.

8. **EXECUTOR.—A Nonresident may be Appointed** as executor, under the statutes of Utah, provided he is a resident and citizen of the United States. (Wyo.) Hecht v. Carey, 981.

9. **EXECUTOR — Nonresident — Suspension for Removing from State.**—A nonresident executor who continues his nonresidence, but nevertheless comes into the state to attend to the business of his executorship, cannot be suspended or removed solely on the statutory ground that he "has permanently removed from the state." (Wyo.) Hecht v. Carey, 981.

EXEMPTIONS.

1. **EXEMPTION LAWS** of one state pertain solely to the remedy and will not be enforced in another state. (W. Va.) National Tube Co. v. Smith, 771.

2. **EXEMPTION — Garnishment — Injunction.**—An injunction will not lie against a garnishment of money owing by the garnishee to a nonresident debtor, on the ground that such money is exempt by the law of the state where such debtor resides. (W. Va.) National Tube Co. v. Smith, 771.

3. **EXEMPTION OF WAGES, Injunction to Protect.**—If a judgment creditor sues out successive garnishments against the wages of his debtor, which are clearly exempt from execution, a suit in equity may be maintained to enjoin further proceedings in the garnishment and to prevent the paying of such wages to any person except the judgment debtor. (Neb.) Seiver v. Union Pac. R. R. Co., 393.

See Executions, 3-5.

FELLOW-SERVANTS.

See Master and Servant, 6-8.

FINDINGS.

See Trial, 5.

FIXTURES.

FIXTURES—Building Materials Pass with Realty.—Where a lot on which stands a partially constructed building is conveyed,

cut stone and structural iron lying on the lot and on adjoining land and intended for use in the completion of the building, pass with the conveyance. (Mich.) Byrne v. Werner, 315.

FORTHCOMING BONDS.

See Execution, 1.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS—Execution Sales.**—A parol agreement to purchase land at execution sale, and resell it, and after deducting the purchase money and expenses, to pay the balance to the execution defendant, is within the statute of frauds, and cannot be enforced. (Pa. St.) Bryan v. Douds, 544.

2. **FRAUDS, STATUTE OF.—Only the Party to be Charged Need** Sign an Agreement within the statute of frauds. Its signing by the other party is immaterial. (N. J. Eq.) Charlton v. Columbia Real Estate Co., 495.

3. **FRAUDS, STATUTE OF—Several Papers.**—It is not necessary that all the terms of a contract be agreed to at one time, nor written on one piece of paper. If all the papers taken together contain the whole bargain, they form such a memorandum as satisfies the statute. (N. J. Eq.) Charlton v. Columbia Real Estate Co., 495.

4. **FRAUDS, STATUTE OF—Memorandum Addressed to Third Person.**—It does not signify to whom the memorandum is addressed; it may be to a third person and yet be a good writing to satisfy the statute of frauds. (N. J. Eq.) Charlton v. Columbia Real Estate Co., 495.

5. **STATUTE OF FRAUDS—Undelivered Writing as Containing** Part of Evidence of Contract.—Where the memorandum required to satisfy the statute of frauds specifies that a sum designated has been received for a lease for which details are to be settled, a lease subsequently signed by the party to be charged, but never delivered, is admissible to show that such details have been settled, if with the other and pre-existing memorandum it shows a complete agreement upon the terms of the lease. (N. J. Eq.) Charlton v. Columbia Real Estate Co., 495.

6. **FRAUDS, STATUTE OF—Agreement, When Within Because not to be Performed Within a Year.—Any Excess of a Year,** however short, brings the contract within the statute of frauds and renders it nonenforceable. (Wis.) Chase v. Hinckley, 896.

7. **FRAUDS, STATUTE OF.—Agreement not to be Completed Until a Year After the Commencement of Performance,** is within the statute of frauds, though such commencement is to be on the day following the making of the agreement. (Wis.) Chase v. Hinckley, 896.

8. **STATUTE OF FRAUDS.—A Contract for Personal Services is** Within the statute of frauds if it is by its terms for a year and is to commence at a date in the future, though, as a matter of law, the contract might be terminated within a year by the death of one of the contracting parties. (Wis.) Chase v. Hinckley, 896.

9. **FRAUDS, STATUTE OF.—Partial Performance of a Contract** for Personal Services void under the statute of frauds does not save it. (Wis.) Chase v. Hinckley, 896.

See Contracts, 10; Husband and Wife, 5.

Note.
Frauds, Statute of, telegraph, contracts by, when satisfy, 746, 760.
Fraudulent Conveyances, action to cancel brought by judgment creditor after execution sale, 81, 82.
action to cancel brought by judgment creditor before execution sale, 82.
concurrent jurisdiction of courts of law and equity to set aside, 82.
equity, jurisdiction of to grant relief against, 83.
equity, jurisdiction of to grant relief against, cases denying, 83, 84.
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FUGITIVE FROM JUSTICE.

See Appeal and Error, 1.

GARNISHMENT.

See Injunction, 4-6.

GIFTS.

GIFT—Evidence.—To Establish a Parol Gift of Land, the clearest and most satisfactory evidence is required. (Utah) **Raleigh v. Wells,** 689.

See Deeds, 9, 10; Husband and Wife, 2, 3.

HABEAS CORPUS.

See Judgments, 17.

HOMESTEADS.

In General.

1. **HOMESTEAD—Vacant Lot—Occupancy.**—A person who is insolvent, and without any prospect of obtaining money to build a house, cannot indefinitely hold a vacant lot as a homestead which she has occupied only by raising vegetables thereon. (Mich.) Ware v. Hall, 301.

2. **HOMESTEAD.—Intention Without Occupancy** cannot create a homestead, for the law requires occupancy, as well as intention. (Mich.) Ware v. Hall, 301.

3. **HOMESTEADS.—Exceptions in Constitutions** rendering homesteads liable for obligations contracted for the purchase of the property must be strictly construed. (Fla.) Wilhelm v. Locklar, 111.

4. **HOMESTEADS, SOLDIER'S ADDITIONAL — Conveyance — Title by Relation—Trespass.**—An assignee of a soldier's additional homestead, upon properly filing an application for a specific tract of land, acquires an equitable title therein, which ripens into a legal title relating back to the date of application upon issuance of patent, and such equitable interest may be conveyed by quitclaim deed, and when patent issues the legal title inures to the benefit of the grantee, who may then maintain an action for trespass committed upon the land after the date of application and before the issuance of the patent. (Minn.) Gilbert v. McDonald, 368.

Judgment Lien.

5. **HOMESTEADS—Judgment Lien.**—A judgment upon an indebtedness not constituting an obligation contracted for the purchase of a homestead is not a lien thereon. (Fla.) Wilhelm v. Locklar, 111.

6. **HOMESTEADS — Purchase Money—Judgment Lien.**—If one loans money to a purchaser of land and the latter uses it in paying off a note to a third person for the purchase money of his homestead, especially when the lender does not rely on the property for security, but takes a simple note therefor, and looks to the indorser on such note for payment, the transaction does not constitute an obligation contracted for the purchase of a homestead, and a judgment for the amount of the note is not a lien against such homestead. (Fla.) Wilhelm v. Locklar, 111.

Forced Sales.

7. **HOMESTEAD, Forced Sale of—Restriction of Method of.**—The sections of the statute of Nebraska limiting the value of a homestead, designating the instances in which it is liable to forced sale, and providing that both spouses must join in a conveyance thereof, exclude all other means of conveying or encumbering the homestead or rendering it liable to forced sale. (Neb.) Van Doren v. Wiedeman, 419.

8. **HOMESTEAD, Forced Sale — Appraisement, Absence of.**—No valid forced sale can be made as affecting the homestead right until after an appraisement thereof in the manner prescribed by statute, at the instance of the creditor. (Neb.) Van Doren v. Wiedeman, 419.

9. **HOMESTEAD, Sale of Under Execution Against Husband After His Transfer to His Wife.**—If the transfer of a homestead is made by a husband to his wife, a judgment having first been entered against him, a subsequent sale under execution issued on such judgment, no proceedings having been had to annul the conveyance, is void. (Neb.) Van Doren v. Wiedeman, 419.

10. **HOMESTEAD—Execution Sale, Effect of Denial of Motion of Purchaser to be Released from His Bid.**—If an execution sale of a homestead is void for want of appraisement, the denial of a motion by the purchaser to be relieved from his bid does not place him in any better, nor the homestead claimants in any worse, position than before. (Neb.) Van Doren v. Wiedeman, 419.

11. **HOMESTEAD.—An Execution Sale of a Homestead Under a Judgment Against the Husband Only** conveys no greater title than would a conveyance by him in which his wife did not join. (Neb.) Van Doren v. Wiedeman, 419.

12. **HOMESTEAD, Estoppel Arising from Claiming the Proceeds of a Forced Sale of.**—If, after an execution sale of a homestead and the payment of his bid by the purchaser, the wife of the judgment debtor appears and claims and receives the surplus proceeds of such sale, a conveyance of the homestead having been previously made to her by her husband, this does not estop her from afterward avoiding the sale on the ground that it was void. Before the purchaser can invoke an estoppel, it must appear that he changed his position relying on some action taken by the wife. (Neb.) Van Doren v. Wiedeman, 419.

See Subrogation, 5.

HOMICIDE.

1. **CRIMINAL LAW—Self-defense—Abandonment of Assault.**—Where a person makes an unprovoked assault on another for the purpose of committing a felony, before the assailant can claim or exercise the right of self defense he must in good faith abandon his criminal design and withdraw from the contest, and at the same time notify his adversary of such abandonment in such a way as to man-

ifest his good faith and to remove all just apprehension there may be in the mind of the person assaulted that the withdrawal may be only a ruse to enable the assailant to gain some undue advantage and again renew the assault. (Utah) State v. Shockley, 639.

2. CRIMINAL LAW—Self-defense—Abandonment of Assault.—Where a person boards a st 'et-car for the purpose of robbery, covers the employés with his gun, but as one of them draws a gun and directs him to throw up his hands, retreats and falls at the door, whereupon they rush upon him, and he, keeping his gun in his hand ready to shoot, giving no notice of an intention to abandon his felonious purpose and attempting to make his escape, shoots one of them, he is not entitled, on a trial for murder, to an instruction on the law of self-defense relative to the question of abandonment of his criminal design. (Utah) State v. Shockley, 639.

3. CRIMINAL LAW—Self-defense—Retreat of Assailant.—Where a person, intending to commit a robbery, covers another with a pistol, whereupon the latter himself draws a pistol and directs the robber to throw up his hands, the robber, as he retreats and attempts to escape, is not, in respect to the right of self-defense, in so favorable a position as is the aggressor in a sudden quarrel who withdraws from the combat and place of encounter. (Utah) State v. Shockley, 639.

4. CRIMINAL LAW—Felonious Assault—Justifiable Homicide.—Where a person boards a street-car for the purpose of robbery, covers the two railway employés thereon with his pistol, but, as one of them draws a pistol and directs him to throw up his hands, retreats and falls at the door, whereupon the two rush upon him, and he, though attempting to escape, keeps his gun in his hand ready to shoot and gives no notice of an intention to abandon his felonious purpose, either employé is justified, at any stage of the affray, in shooting him down to protect their own persons and to prevent his escape. (Utah) State v. Shockley, 639.

HUSBAND AND WIFE.

Contracts and Conveyances.

1. MARRIED WOMEN — Building Contracts — Agency of Husband.—Where houses are erected on the land of a married woman, she is liable for the value of materials selected by her and used in the construction of the buildings, although her husband, with her knowledge, purchases the materials, and the vendors, without any misrepresentation on his part, suppose him to be the owner of the land. (Mich.) Popp v. Connery, 304.

2. HUSBAND AND WIFE — Transfers from Her to Him.—The Burden is upon the Husband to show that a gratuitous transfer to him from his wife was made freely, and that the transaction was fair and proper. (Neb.) Hovorka v. Havlik, 387.

3. HUSBAND AND WIFE.—A Transfer Made by a Wife to Her Husband Because of Threats made against her by him that he would leave her, and because of threats against her children is void. (Neb.) Hovorka v. Havlik, 387.

Tenancy by Entireties.

4. TENANCY BY ENTIRETIES—Right of Wife to Crops.—A wife has no right to a share of the crops growing on land held by herself and husband as tenants by the entirety. She cannot compel him to account for a share of such crops when they are living apart. (Mich.) Morrill v. Morrill, 306.

5. TENANCY BY ENTIRETIES — Right of Wife to Profits. — A Verbal Agreement between husband and wife that she shall have

an equal share in the profits arising from land held by them as tenants by the entirety is unenforceable. (Mich.) Morrill v. Morrill, 306.

Limitations and Adverse Possession.

6. **HUSBAND AND WIFE—Limitation of Actions.**—Although the statute of limitations does not run against causes of action growing out of transactions between husband and wife, this rule does not extend to a cause of action not so arising and against which such statute commenced to run before the husband and wife became adversaries in respect thereto. (Wis.) Charmley v. Charmley, 827.

7. **HUSBAND AND WIFE—Adverse Possession.—A Plural Wife** who resides on the property of her husband the same as his other wives does not acquire a title by adverse possession, when her possession is not inconsistent with a mere license or permission from him. (Utah) Raleigh v. Wells, 689.

8. **HUSBAND AND WIFE, Prescriptive Title of the One Against the Other.**—Where a husband and wife live together on the same real property, he has no greater possession than she, and cannot acquire title by prescription against her. (Neb.) Hovorka v. Havlik, 387.

Plural Wives.

9. **HUSBAND AND WIFE—Inheritance.—A Plural Wife** does not acquire the status of a lawful wife, and is without the pale of the law of inheritance as to any property acquired by the husband before or after the marriage. (Utah) Raleigh v. Wells, 689.

10. **HUSBAND AND WIFE—Dower.—A Plural Wife** acquires no right of dower in her husband's estate. (Utah) Raleigh v. Wells, 689.

11. **HUSBAND AND WIFE—Gift.—A Plural Wife** may accept a gift from her husband. (Utah) Raleigh v. Wells, 689.

12. **HUSBAND AND WIFE—Adverse Possession.—A Plural Wife** may acquire title to real estate of her husband by adverse possession founded on a gift. (Utah) Raleigh v. Wells, 689.

Note.

Husband and Wife, imputing to one the negligence of the other, 286, 296.

INDEPENDENT CONTRACTORS.

See Master and Servant, 2.

INFANTS.

1. **INFANCY—Plea of—Action for Purchase Money.**—In an action against an infant to recover the purchase money of property sold to him, part of the proceeds of which he still retains, he is entitled to the plea of infancy as a defense, without having returned or offered to return such property or proceeds. The successful intervention of such plea confers upon the person who made the sale to the infant only the right to reclaim his property or such part of it as remains in the possession of the infant. (W. Va.) Wallace v. Leroy, 777.

2. **INFANCY—Plea of—Effect on Attachment.**—In an action against an infant to recover the purchase price of goods sold to him and by him resold, and the proceeds of which have been attached in the hands of a third person, the successful intervention by such infant of his plea of infancy annuls the contract, defeats the collection of the debt, dissolves the attachment, and releases the funds. (W. Va.) Wallace v. Leroy, 777.

3. **INFANCY is No Defense** to an action for the purchase money of articles furnished to an infant which are necessary to his subsistence and comfort, and to enable him to live according to his real position in society. (W. Va.) Wallace v. Leroy, 777.

4. **INFANCY.—Articles Furnished Infants for Use in Business,** such as merchandising, farming or conducting a shop of any kind, are not regarded as necessaries, for which he can be bound. (W. Va.) Wallace v. Leroy, 777.

INJUNCTIONS.

1. **INJUNCTION—Evidence of Insolvency of Defendant.**—Upon a hearing for an injunction, proof of the insolvency of the defendant must be direct and positive and not merely upon information and belief. (Fla.) Doke v. Peek, 70.

2. **INJUNCTION—Error in Granting, How Reached.**—If the defendants deem an injunction broader than the averments of the bill justify, they should apply to the court to modify it, and not violate it. (Ill.) Franklin Union No. 4 v. People, 248.

3. **INJUNCTION—Voluntary Association — Defect of Parties.**—If there is a defect of parties where a bill for an injunction is filed in the name of a voluntary association on behalf of its members, instead of in the names of the members, the order granting an injunction is not void, and the defendants are not justified in violating it. (Ill.) Franklin Union No. 4 v. People, 248.

4. **EQUITY JURISDICTION—Garnishment—Multiplicity of Suits.** Although a person is garnished by different persons on distinct and separate demands, the fact that the same question of law may arise in all of the cases does not give equity jurisdiction to enjoin the suits to prevent a multiplicity of actions. (W. Va.) National Tube Co. v. Smith, 771.

5. **EQUITY JURISDICTION—Injunction—Interest in Action.**—Equity has no jurisdiction to enjoin a justice of the peace from acting in an action before him because of his interest in the subject matter of the suit. (W. Va.) National Tube Co. v. Smith, 771.

6. **INJUNCTION — Garnishment — Suits in Different States.**—An injunction will not lie to restrain the prosecution of a garnishment proceeding in one state, on the ground that an injunction is later sued out in another state and is pending, to enjoin the garnishee from paying the money under any judgment rendered in such garnishment proceeding. (W. Va.) National Tube Co. v. Smith, 771.

7. **INJUNCTION Against Cutting Timber.**—The fact that timber standing upon land constitutes its chief value does not give equity jurisdiction to enjoin the cutting of such timber, upon the application of one who owns it, but not the land. (Fla.) Doke v. Peek, 70.

8. **INJUNCTION Against Cutting Timber.**—A bill for an injunction alleging that the complainant is the owner of timber upon certain land and in the actual possession thereof, and that such land is chiefly valuable for such timber, and is wild, unimproved, and unoccupied, is insufficient to support an injunction against a trespasser thereon, even though the chief value of the land would be destroyed by the removal of such timber. (Fla.) Doke v. Peek, 70.

See Judicial Sale, 3; Municipal Corporations, 1-5; Trade Union.

INSANE PERSONS.

1. **INSANE PERSONS—Insanity as Defense to Contract.**—The indorsement of a note by the insane payee is void and confers no right upon the indorsee, and in an action by the latter against the

maker of the note, the insanity of the payee and indorser at the time of the indorsement is a valid defense. (Ala.) Walker v. Winn, 50.

2. **INSANE PERSONS—Contracts of.**—A contract of an insane person, whether resting in parol or by deed, is absolutely void, and the person contracting with such insane person can take no benefit under the contract. (Ala.) Walker v. Winn, 50.

3. **TRIAL—Amendment of Pleading—Insanity as Defense—Comment of Counsel.**—While an amendment to a pleading when allowed relates back to the time of the filing the original pleading, it is nevertheless legitimate for counsel to comment on the occurrences during the trial, including the setting up of the defense of insanity, which was not originally referred to in the original pleading filed two years before the amendment. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

See Carriers, 23, 24; Principal and Agent, 2.

Note.

Insanity, powers of attorney, revocation of by, 860.

INSTRUCTIONS.

See Trial, 3, 4.

INSURANCE.

Foreign Companies and Their Contracts.

1. **INSURANCE—Place of Contract.**—If an application is made out by an insurer in Pennsylvania and sent by mail to an applicant in Wisconsin, who, in that state, fills out and signs the application and forwards it to the insurer's office in Pennsylvania, and directs a policy to issue, and the insurer thereupon issues its policy in the latter state and mails it to the insured in the former, who then signs the note, reciting that it is for the balance of the first premium and is payable in Pennsylvania, the contract of insurance is a Pennsylvania contract. (Wis.) Presbyterian Ministers' Fund v. Thomas, 919.

2. **INSURANCE, Life, Foreign Contracts Respecting, When Invalid.**—If a statute provides that no corporation, association, partnership or individual shall do any business of insurance of any kind or make any guaranty, contract, or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder in this state, or with any resident of the state, except according to the conditions and restrictions of the statute, a contract of insurance made in Pennsylvania by a corporation of that state to a resident of the state where the statute is in force falls within its provisions and is prohibited thereby, and the statute is not in contravention of the constitution of the United States. (Wis.) Presbyterian Ministers' Fund v. Thomas, 919.

3. **INSURANCE, Foreign, Life.—A State has the Right to Impose Conditions** on foreign insurance companies doing business therein when such conditions are not in conflict with the constitution of the United States. (Wis.) Presbyterian Ministers' Fund v. Thomas, 919.

4. **CONTRACTS, Foreign, Comity, When does not Require the Enforcement of.**—When a contract of life insurance is made by a Pennsylvania corporation with a resident of Wisconsin which is forbidden by the laws of the latter state, its courts will not enforce such a contract on the ground of comity. Hence, an action cannot be maintained in those courts on a note given for the first premium

of such insurance. (Wis.) Presbyterian Ministers' Fund v. Thomas, 919.

Accident Insurance.

5. **ACCIDENT INSURANCE—Blood Poisoning from Wound.**—A policy of insurance against death by external violence and accidental means covers the case of one who accidentally cuts his finger by the breaking of a bottle from which wound blood poisoning ensues, and death results. (Ill.) Central Accident Ins. Co. v. Rembe, 235.

6. **ACCIDENT INSURANCE—Blood Poisoning from Wound.**—A clause in an accident insurance policy exempting the insurer from liability for death resulting from the "taking of poison or contact with poisonous substance" does not embrace a case where the insured, a physician, while preparing medicine for a syphilitic patient, accidentally cuts his finger by the breaking of a bottle, and the virus from the patient enters the wound causing fatal blood poisoning. (Ill.) Central Accident Ins. Co. v. Rembe, 235.

7. **ACCIDENT INSURANCE — Blood Poisoning — Operation.**—A slip attached to a policy of accident insurance issued to a physician, which extends the policy to cover "septic wounds caused by accident while performing any operation pertaining to the business of the insured, the poison matter being injected into the wound at the time of the accident," is not confined in its operation to accidents met with by the insured while in the act of performing an operation or administering treatment upon a patient, but includes accidents which occur while he is preparing medicine for a patient. (Ill.) Central Accident Ins. Co. v. Rembe, 235.

Additional Insurance.

8. **INSURANCE, FIRE—Additional Insurance—Waiver of Condition.**—If, at the time that a policy of fire insurance is issued, other insurance exists on the same property, and that fact is known to the insurance agent, who communicates it to the insurance company, and the latter accepts the premium without denying the validity of the policy on account of such other insurance until after the loss, such conduct on the part of the company constitutes a waiver of a provision in the policy requiring written consent for other insurance, and the company is liable for the loss though its consent for such other insurance was not indorsed on the policy. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

9. **INSURANCE, FIRE—Additional Insurance.**—If a fire insurance company accepts the premium for a policy with knowledge of additional insurance then existing, without requiring the insured to comply with a provision in the policy concerning additional insurance, the insurer thereby gives consent for additional insurance to the amount then in existence on the insured property, for the full period of its own policy. The mere substitution of one policy of additional insurance for another of the same amount is permissible under such consent. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

Iron-safe Clause.

10. **INSURANCE—Pleading—Iron-safe Clause** in a policy of fire insurance is a promissory warranty in the nature of a condition subsequent with which it is not necessary for plaintiff to allege a compliance. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

11. **INSURANCE—Pleading—Iron-safe Clause—Waiver.**—A breach of an iron-safe clause contained in a policy of fire insurance is a matter of affirmative defense to be set up by plea, and not a condi-

tion precedent, performance of which is required to be averred in the declaration and a replication alleging a waiver of such clause, or of a forfeiture accruing upon a breach thereof, is not a departure in pleading, although the declaration sets forth the iron-safe clause, and avers generally a compliance with all conditions precedent contained in the policy. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

12. **INSURANCE, FIRE—Iron-safe Clause—Waiver of Forfeiture.** If, after notice of a total loss under a fire insurance policy, and that it has been forfeited for noncompliance with an iron-safe clause contained therein, the insurance company, through its general agent, proceeds to adjust the loss, and upon such adjustment, finding that the loss far exceeds the amount of the policy, promises and agrees to pay the amount thereof, it thereby waives such forfeiture, and is bound by such waiver, and estopped to set it up to defeat collection to the amount agreed to be paid. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

Waiver of Forfeiture.

13. **INSURANCE — Forfeiture — Waiver.**—A clause in a fire insurance policy that "the use of general terms or anything less than a distinct specific agreement clearly expressed and indorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction therein," may itself be waived, and if the insurer adjusts a loss, and promises and agrees to pay the policy after full knowledge of a forfeiture thereof by reason of the breach of a promissory warranty therein, this will constitute a waiver binding on the insurer, although such waiver is not indorsed on the policy. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

Notice and Proof of Loss.

14. **INSURANCE, FIRE.—Notice and Proof of Loss.**—The requirements in a standard insurance policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to the right to sue, but failure to comply with such requirements within the time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect. Such failure merely postpones the day of payment, provided notice is given and proof of loss is made within such time as will enable the insured to bring his suit within the time limited by the policy. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

15. **INSURANCE, FIRE — Proof of Loss as Notice of Loss.**—If proofs of loss served upon an insurance company are sufficiently full to give it notice of the loss required to be given by the insurance policy, such proofs will be sufficient as notice of the loss. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

16. **INSURANCE.**—Proof of Loss signed and sworn to by the assured, stating that the fire occurred at a certain hour of a day named, that it originated in the roof or attic of the insured building, that the cause of its origin was to him unknown, that such fire did not originate by any act, design, or procurement on the part of the assured, or in consequence of any fraud or evil practice on his part, and that any other information required by the insurer would be furnished on request, substantially complies with a provision in the policy requiring the proof of loss to state the knowledge and belief of the insured as to the time and origi of the fire, especially when the insurer requests no further information from the insured. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

Arbitration Clause.

17. **INSURANCE—Arbitration Clause.**—If arbitration is provided for by an insurance policy, in case the parties are unable to agree as to the amount of loss, the arbitration provided for is not a condition precedent to the right of action upon the policy unless the parties actually disagree as to the amount of the loss, and it is unnecessary, in the absence of such disagreement, to allege in the complaint in an action upon the policy that arbitration was, or was not had, or that it was waived by the insurer. (Minn.) Kelly v. Liverpool etc. Ins. Co., 351.

Actions—Pleading.

18. **PLEADING—Insurance.**—The execution of an insurance policy under seal is properly denied by the plea of non est factum. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

19. **PLEADING—Insurance.**—In declaring upon an insurance policy it is not necessary to allege performance of promissory warranties or conditions subsequent, but only of conditions precedent by general averment. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

20. **PLEADING.—Promissory Warranties** and conditions subsequent are matters of defense to be pleaded by the defendant which the plaintiff need not anticipate, and negative by averring performance. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

Attorney Fees—Constitutional Law.

21. **CONSTITUTIONAL LAW—Insurance.**—A statute authorizing the recovery of a reasonable attorney's fee against life and fire insurance companies in suits upon policies issued by them is constitutional and valid. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

22. **INSURANCE, Fire—Attorney Fees—Constitutional Law.**—A statute authorizing the recovery of a reasonable attorney's fee against insurance companies in suits upon policies issued by them is constitutional. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

INTERPRETER.

See Evidence, 3.

INTOXICATING LIQUORS.

LIQUOR, Giving to Minor as Act of Hospitality.—The statute of Michigan which prohibits the furnishing of liquor to minors does not make it unlawful for one, in exercising the hospitality of his home, to give liquor to a minor guest. (Mich.) People v. Bird, 299.

JUDGMENTS.

In General.

1. **JUDGMENTS by Confession** entered when no default has been taken, no declaration filed, no summons addressed or delivered, to a proper officer to serve, and when no appearance has been made by the plaintiff or defendant, are void and will not support a creditor's bill. (Fla.) Wilhelm v. Locklar, 111.

2. **JUDGMENTS Nunc Pro Tunc—Execution.**—If a judgment has been amended nunc pro tunc, an execution issued thereon properly recites the date of the original judgment as the date of the rendition of the judgment on which the execution was issued. (Ala.) Carter v. Smith, 36.

3. **JUDGMENTS—Actions upon.**—An action may be maintained upon a judgment before the expiration of the time after the rendition

of such judgment within which an execution could be issued to enforce it. (Ala.) Kaufman v. Richardson, 40.

4. **JUDGMENTS—Collateral Attack.**—A judgment of a court of general jurisdiction cannot be collaterally attacked unless the record affirmatively shows want of jurisdiction. (Minn.) Sodini v. Sodini, 371.

As Evidence.

5. **JUDGMENTS as Evidence.**—The rule that a judgment is admissible in evidence against all the world, as a link in a party's chain of title does not apply to all judgments. It applies more particularly to judgments in partition proceedings, probate decrees, actions to foreclose mortgages or liens, and to all judgments rendered in actions, the object of which is to acquire title held by the adverse party. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

6. **JUDGMENTS are Admissible in Evidence** as a link in the chain of title only where they transfer title or render valid a particular link which, without the judgment, would be defective or invalid. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

7. **JUDGMENTS as Evidence.**—The rule that a judgment is admissible in evidence against all the world as a link in a party's chain of title does not apply to ordinary judgments in actions to determine adverse claims, which do not purport to transfer title, or render valid an otherwise defective link in the chain of title. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

8. **JUDGMENTS as Evidence.**—An ordinary judgment, in an action to determine adverse claims to land, obtained by a total stranger to the title against a person appearing of record to be the owner, but who in fact was not, does not operate to transfer the title or constitute a link in the chain of title, nor is it admissible as such against the true owner, who was not a party to nor bound by such judgment. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

Conclusiveness and Res Judicata.

See Officers.

9. **JUDGMENTS are Conclusive** only against parties thereto and their privies. As to strangers, they are evidence only of their entry. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

10. **JUDGMENTS—Privies.**—To constitute one the privy by estate to a party to a judgment, it must appear that he succeeded after the bringing of the action by which he is sought to be concluded to an estate or interest held by such party. (Minn.) Minnesota Debenture Co. v. Johnson, 354.

11. **RES JUDICATA—Pleading.—A Former Adjudication is Admissible in Evidence Without Pleading It.** (Wis.) Davis v. Schmidt, 958.

12. **RES JUDICATA.—A Judgment in Favor of the Plaintiff for Interest on a Promissory Note** is conclusive in a subsequent action for the balance of the principal thereof, if the matters in issue in the second action were actually litigated and determined in the first. (Wis.) Davis v. Schmidt, 938.

13. **A JUDGMENT Against One of the Makers of a Joint and Several Note for Interest Then Due Thereon** does not bar a subsequent action against all the makers for the balance of an installment of principal thereof. (Wis.) Davis v. Schmidt, 938.

14. **RES JUDICATA.—The Recovery of Judgment for One Year's Interest on a Note** is not necessarily conclusive of the right to re-

cover a balance alleged to be due thereon, in the absence of any allegation that the matters involved in the second action were litigated or determined in the first. (Wis.) Davis v. Schmidt, 938.

15. **RES JUDICATA.—When Two Actions Involve Different Subject Matters,** though between the same parties, a judgment in one is in the other conclusive only as to the matters actually adjudicated, not upon any question which might have been, but in fact was not, considered. (Wis.) Pereles v. Gross, 901.

16. **RES JUDICATA—Judgment, When Conclusive Though the Subject Matters were Different.**—When in a litigation about the distribution of a fund it becomes necessary for the court to find where a boundary line is, and this finding can only be based on the trial of the question involving some form of evidentiary proof, the finding and the judgment of the court on the question are conclusive of the same question in a subsequent action of ejectment between the same parties and their privies. (Wis.) Pereles v. Gross, 901.

17. **JUDGMENT in Habeas Corpus—Res Judicata.**—A judgment in habeas corpus proceedings by a wife against her husband for the custody and control of their infant child, in favor of the wife, is res judicata in a subsequent action by such husband against his wife for divorce and the custody of such child, as to all facts existing at the time of rendition of the judgment in the habeas corpus proceedings. (W. Va.) Dawson v. Dawson, 800.

18. **RES JUDICATA—Judgment in Criminal Action.**—A judgment of acquittal of an alleged husband on a trial for bigamy in having married the plaintiff in a civil suit to establish dower, is not res judicata as to plaintiff's right to recover. (S. C.) Frierson v. Jenkins, 608.

19. **RES JUDICATA.**—Judgment in criminal proceedings does not support the pleas of res judicata in a civil action. (S. C.) Frierson v. Jenkins, 608.

20. **RES ADJUDICATA.—"The Right, Question or Fact,"** in the legal acceptation of the terms, which, when put in issue and determined, thereby becomes subject to the rule of res adjudicata, is necessarily distinguishable from holdings and expressions of the court with reference to the principles of the law, which, when applied to the facts or thing in litigation, must control in the final disposition of the action and determine the judgment rendered therein. (Neb.) State v. Broatch, 477.

21. **RES JUDICATA.—The State is Bound as Any Other Litigant** by a decision whether favorable or adverse to it. (Neb.) State v. Broatch, 477.

Payment.

22. **JUDGMENTS — Payment.**—If a judgment debtor furnishes money to a third person to buy up the judgment, and such third person thus buys it at less than its face value, the creditor not knowing the facts, this amounts to a part payment only of the judgment. (Fla.) Dickerson v. Campbell, 116.

23. **JUDGMENTS—Plea of Payment.**—A plea to a scire facias to revive a judgment, alleging that a third person, as agent for the judgment debtor, purchased with money furnished by the latter, the judgment for less than its face value is not a good plea in bar, but amounts at most to a plea of payment pro tanto. (Fla.) Dickerson v. Campbell, 116.

JUDICIAL SALE.

1. **AT A JUDICIAL SALE the Rule of Caveat Emptor Applies,** and the purchaser buys only such estate or interest as his debtor has. (N. J. Eq.) Brady v. Carteret Realty Co., 502.

2. **JUDICIAL SALE—Disparagement of Title by the Judgment Creditor.**—A judgment creditor has the right at a sale under his judgment to state any facts within his knowledge respecting the property about to be sold and relating to the title, possession, or right to possession thereof, but he has no right to give his opinion or state his legal conclusion that the defendant has no title and that the purchaser will take nothing by the sale. To permit a judgment creditor to do this would be to permit him to defeat the right of the judgment debtor to have the property sold for whatever an unalarmed purchaser might prove willing to pay. (N. J. Eq.) Brady v. Carteret Realty Co., 502.

3. **JUDICIAL SALE—Enjoining Until the Question of Title is Settled.**—If a judgment creditor publicly asserts, when he is about to sell certain real property under his judgment, that the defendant has no title thereto and that the purchaser will get nothing by the sale, the defendant is entitled to have the proposed sale enjoined until the question of title is determined. (N. J. Eq.) Brady v. Carteret Realty Co., 502.

4. **A SHERIFF'S DEED Passes the Same Title Under the Statute of New Jersey** which a deed of bargain and sale executed by the judgment debtor would pass. (N. J. Eq.) Brady v. Carteret Realty Co., 502.

JURISDICTION.

See Courts; Process; Venue.

JUSTICE OF PEACE.

1. **JUSTICE OF PEACE.—A Writ of Attachment is** authorized to be issued under the statutes of Wyoming by a justice of the peace only at or after the commencement of a civil action, which is required to be commenced by a summons. (Wyo.) Cheeseman v. Fenton, 1010.

2. **JUSTICE OF PEACE—Attachment—Summons.**—A justice of the peace has no authority, under the statutes of Wyoming, to issue an attachment, unless a summons has been issued, either separately or as a part of the writ of attachment, although the defendant cannot be personally served. (Wyo.) Cheeseman v. Fenton, 1010.

LABOR UNION.

See Trade Union.

LANDLORD AND TENANT.

Estoppel to Deny Landlord's Title.

1. **LANDLORD AND TENANT—Estoppel to Deny Landlord's Title.**—One who goes into possession of land as a tenant of another is estopped to deny the title of the latter. It is sufficient between the lessor and the tenant that the former claims ownership, and, as a result of this claim, the tenant is put in possession and allowed to occupy the premises. (Ga.) Hodges v. Waters, 166.

2. **LANDLORD AND TENANT—Estoppel to Deny Landlord's Title.**—One who goes into the possession of land as a tenant is es-

topped to set up title adverse to his landlord from whom he obtained possession until he has surrendered possession to him, and re-entered after such surrender under some other person. (Ga.) Hodges v. Waters, 166.

Leases.

3. **LEASE—Condition Precedent—Deposit by Lessee as Security for Performance.**—Where, in an agreement purporting to be a lease, the lessee agrees to pay as rental the taxes for the current year, to restrict the use of the premises in certain respects, and to deposit a specified sum with the lessor as security for the faithful performance of the lease and the payment of the taxes, the provision for the deposit is a condition precedent to the lease becoming operative or effective. (Wyo.) Frank v. Stratford-Handcock, 963.

4. **LEASE—Failure to Perform Condition Precedent—Possession by Lessee.**—The fact that a lessee is in possession of the premises at or before the signing of the lease does not impart vitality to the lease, if he fails to perform a condition precedent to the lease becoming operative. (Wyo.) Frank v. Stratford-Handcock, 963.

5. **LANDLORD AND TENANT—Liability for Rent.**—If a person goes into possession of land as the tenant of one person, and expressly agrees to pay rent therefor to another person for a specified time, he will be bound by his agreement, provided it is based upon a sufficient consideration, but after the expiration of the time fixed, no promise to pay further rent will be implied, and he may then deny liability for rent, although he remains in possession as the tenant of the person who placed him in possession. (Ga.) Hodges v. Waters, 166.

Oil Leases.

6. **OIL LEASES—Ejectment.**—A grant of an exclusive privilege to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, does not vest in the grantee any estate in the land or oil, but is merely a license, or grant of an incorporeal hereditament, and he cannot maintain ejectment against the grantor or those claiming under him by subsequent grant, if he has never been in actual possession, though, at the time of the action of ejectment, oil is being produced in paying quantities. (Pa. St.) Kelly v. Keys, 547.

7. **OIL LEASES.—Grants of Exclusive Rights** to mine for and produce oil, though it be a mineral, is not a sale of the oil that may afterward be discovered. When oil has been discovered under such a grant, it is the grantee's right to produce it and sever it fr m the soil. So much as is thus severed belongs to the parties entitled to it under the terms of the grant, not as any part of the real estate, but as a chattel, and only so much as is produced and severed passes under the grant. (Pa. St.) Kelly v. Keys, 547.

LARCENY.

LARCENY.—Crude Turpentine which has run from the body of the tree above into boxes which were cut into the tree to serve as receptacles is, while in such boxes, the subject of larceny. (Ala.) Dickens v. State, 17.

LEASES.

See Landlord and Tenant.

LIBEL AND SLANDER.

1. **A CORPORATION may Maintain an Action for Slander and Libel** upon it in the way of its business or trade. (Wis.) Gross Coal Co. v. Rose, 894.

2. **CORPORATION—Words Libelous per Se.**—To charge of a corporation, whether orally or in writing, that at a time when there was a coal famine and people were suffering for fuel, it, though engaged in the business of selling coal, not only charged an exorbitant price for its coal, but actually refused to sell, even at that price, to people suffering from sickness, is libelous and slanderous per se. (Wis.) Gross Coal Co. v. Rose, 894.

3. **SLANDER, Special Damages, When Need not be Alleged.**—Words spoken of a person in direct reference to his business or trade, which charge him with incapacity, fraud, trickery, dishonorable and mean conduct in the transaction of his business, thereby necessarily tending to injure him in such business, are actionable without proof of special damage. (Wis.) Gross Coal Co. v. Rose, 894.

LICENSES.

See Marriage, 1, 2; Municipal Corporations, 8-15; Theaters and Shows.

Note.

Licenses, for theaters are not taxes, 527.
for theaters, discretion of municipal authorities to refuse, 527, 528.
for theaters, when may be required, 528, 530.

LIMITATION OF ACTIONS.

LIMITATION OF ACTIONS.—When once the statute of limitations has commenced to run on a cause of action, circumstances not expressly provided for by statute will not interrupt its running. (Wis.) Charmley v. Charmley, 827.

See Adverse Possession; Banks and Banking, 2; Covenants, 3; Husband and Wife, 6-8; Subrogation, 6, 7.

Note.

Lost Wills. See Wills.

MANDAMUS.

MANDAMUS to Enforce Attorney's Right to Practice.—Mandamus lies to compel a judge to recognize the right of an attorney to practice in the court presided over by him. (Ill.) People v. Kavanagh, 223.

MANUFACTURER'S LIABILITY.

See Negligence, 4-6.

MARRIAGE.

1. **MARRIAGE—Void License.**—A marriage solemnized without a valid license, and not followed by cohabitation, is not valid, either as a statutory or a common-law marriage. (Ala.) Hawkins v. Hawkins, 53.

2. **MARRIAGE—Duress — Invalid License — Annullment.**—If a person is by duress coerced into entering into a marriage solemnized

under an invalid license, and not followed by cohabitation, the person so coerced may maintain a bill in equity to have such pretended marriage declared null and void. (Ala.) Hawkins v. Hawkins, 53.

3. MARRIAGE—Common-law Marriage—Legitimacy of Child.—If the father and mother of a child, soon after its birth, agreed with each other in one state to become, and live together as, husband and wife until parted by death, thereafter continuing to live together as, and holding themselves out to the world to be, husband and wife, such contract of marriage legitimates their child not only in that state but also in another state where a common-law marriage is recognized as valid. (Pa. St.) McCausland's Estate, 540.

4. MARRIAGE—Validity—Presumption—Legitimacy.—If a married man disappears and is not heard from for seven years, it is presumed that he is dead; but there is no presumption as to the actual time when, during such seven years, his death actually occurred, and if his wife remarries within the seven years, in the absence of proof of the actual date of such death, the presumption is in favor of the legitimacy of a child of the second marriage, and in favor of the validity of that marriage as not having occurred prior to the death of such absent husband. (Pa. St.) McCausland's Estate, 540.

See Divorce.

Note.

Marriage, revocation of powers of attorney by, 861, 862.

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

Number of Servants Employed.

1. MASTER AND SERVANT—Nondelegable Duties.—One of the absolute and nondelegable duties of a master is that of seeing that the number of servants employed is sufficient to prevent each of them from being exposed to that class of risks which results from an inadequacy of the force available for the work in hand. (Ala.) Alabama Great Southern R. R. Co. v. Vail, 23.

Independent Contractors.

2. INDEPENDENT CONTRACTORS are not Liable for injuries to third persons occurring after such a contractor has completed the work and turned it over to the owner or employer and it has been accepted by him, though such injury resulted from the contractor's failure to properly carry out his contract. (Ga.) Young v. Smith & Kelly Co., 186.

Vice-principals.

3. MASTER AND SERVANT—General Manager Vice-principal. A general manager, having entire charge of the business of the master, is his alter ego, and the master is responsible to other employés for his acts. (Ala.) Alabama Great Southern R. R. Co. v. Vail, 23.

4. MASTER AND SERVANT—Vice-principal.—An employé delegated by the master with the duty of hiring and discharging servants to perform the work over which he is foreman is the representative of the master in the matter and under obligation to employ servants sufficient to do the work, and failing in this the master is liable therefor. (Ala.) Alabama Great Southern R. R. Co. v. Vail, 23.

5. **MASTER AND SERVANT—Vice-principal.—If an employé** whose negligence is complained of is at the time discharging one of the personal, nondelegable duties which it is the duty of the master to attend to himself, such employé charged with such duties stands in the place of the master, and the latter is liable for his acts. (Ala.) Alabama Great Southern R. R. Co. v. Vail, 23.

Fellow-servants.

6. **MASTER AND SERVANT—Negligence of Master and Fellow-servant.**—Where the negligence of a master and that of a fellow-servant together produce injury to an employé, the master is liable therefor. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

7. **MASTER AND SERVANT—Fellow-servants.—The Test** as to when negligence is that of a master or of a fellow-servant is whether the negligent act is a breach of positive duty owing by the master to his servant. If it is, the negligence is the master's. His liability in such a case does not depend upon the grade of service of the coemployé, but upon the character of the act itself. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

8. **NEGLIGENCE—Contributory—Fellow-servants.**—A servant injured by the negligence of a fellow-servant must have been in the exercise of ordinary care for his own safety or that degree of care which prudent persons usually exercise under similar circumstances in order to recover damages, and if he is injured by a failure to exercise such care, the master is not liable. (Fla.) Florida Central etc. R. R. Co. v. Mooney, 73.

Rules for Safety of Employés.

9. **MASTER AND SERVANT—Promulgation and Enforcement of Rules.**—A master owes a positive and nondelegable duty to his servants to promulgate and also to enforce reasonable rules and regulations for their safety, when the nature of the work or business requires it. He does not discharge his whole duty in this respect by promulgating rules and using ordinary care in selecting men to enforce them. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

10. **MASTER AND SERVANT—Promulgation and Enforcement of Rules.**—A master cannot delegate his duty to promulgate and enforce rules for the safety of his servants, so as to relieve himself from responsibility. Any negligence in the failure to perform or in the manner of performing this duty is his negligence, for which he is liable. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

11. **MASTER AND SERVANT—Disregard of Rules—Notice.**—If a master delegates to a servant the duty of enforcing rules for the safety of his employés, notice to such servant, whatever his rank may be, that the rules are disregarded, is notice to the master. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

12. **MASTER AND SERVANT—Disregard of Rules.—Knowledge** by a master of the failure of his servants to observe rules promulgated for their safety may be inferred from a common practice indulged in for a year to disregard them. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

13. **MASTER AND SERVANT—Failure of Servant to Observe Rules.**—Where a master has promulgated rules for the display of flags by servants going between cars to make repairs, but there is evidence that such rules have not been observed for a year or more, it is a question for the jury whether it is negligence for a car repairer to fail to observe them. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

Methods of Doing Work.

14. **NEGLIGENCE, Contributory.**—If in the performance of his duties an employé has no instructions to pursue a particular method, and two or more methods are open to him, he cannot be said to be negligent, if he in good faith adopts that method which is more hazardous than another, if the one adopted was one which reasonable and prudent persons would have adopted under like conditions and circumstances. (Fla.) Florida Central etc. R. R. Co. v. Mooney, 73.

15. **NEGLIGENCE, Contributory.**—Shifting cars by means of the "kicking back" process is not necessarily at all times an act of negligence per se, even though there may be a safer method of shifting them. (Fla.) Florida Central etc. R. R. Co. v. Mooney, 73.

Assumption of Risks.

16. **MASTER AND SERVANT—Assumption of Risks.**—A stone mason who sees stones fall on two successive days from a "dog" connected with a derrick and known to him to be defective, and who, continuing his work, is injured on the third day by a stone falling on him from such "dog," cannot recover, although in the meantime he has called the attention of the foreman to the defective "dog," and is informed by him that no change will be made. (Pa. St.) Talbot v. Sims, 513.

17. **MASTER AND SERVANT—Assumption of Risks.**—An employé who continues in an employment which by reason of defective machinery or appliances he knows to be dangerous assumes the risk of any accident that may result therefrom, unless he continues in the employment only in pursuance of the promise of his employer to remedy the defect, and the risk is not such as to threaten immediate danger. (Pa. St.) Talbot v. Sims, 513.

18. **MASTER AND SERVANT—Assumption of Risk.**—A servant has a right to assume that his master has used ordinary care to provide for the safety of employés, and he does not assume the risks occasioned by the failure of the master to discharge his duties in this respect, unless he has actual or presumptive knowledge of the master's dereliction of duty and of the perils arising therefrom, and accepts or continues in the employment without protest or complaint. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

19. **MASTER AND SERVANT—Assumption of Risk.**—A servant is entitled to assume that his master has exercised ordinary care in providing for the safety of employés, and is not obliged to pass judgment on the manner and method in which the master is conducting his business. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

20. **MASTER AND SERVANT—Assumption of Risk by Car Repairer.**—Whether a car repairer assumes the risk of his employment in going between cars without the display of flags, when the rule promulgated by the master requiring such display has been for a long period disregarded, is a question for the jury. (Utah) Merrill v. Oregon Short Line R. R. Co., 695.

21. **MASTER AND SERVANT—Assumption of Risk.**—The doctrine of assumed risks arises out of contractual relations existing between master and servant. The servant in his contract of employment assumes the natural and ordinary risks and dangers incident to the service. These risks, and these only, the parties are presumed to have in mind when they enter into the contract. (Utah) Leach v. Oregon Short Line R. R. Co., 708.

22. **MASTER AND SERVANT—Assumption of Risk.**—When there are unusual or extraordinary dangers connected with a service, due to defects in the appliances and equipments used in the operation of the business, an employé assumes the risk thereof, if they are known to him, or are so obvious that he is presumed to have knowledge of their existence, and he continues, without objection, to use such appliances and equipments. (Utah) Leach v. Oregon Short Line R. R. Co., 708.

23. **MASTER AND SERVANT—Assumption of Risk by Brakeman.** Where a brakeman is transferred from a regular freight train to a mixed train on which, in the performance of his duties, he is required to pass along the sides of cars, instead of through them or over their top, he has a right to assume, notwithstanding he has been employed on his run some eight or nine months on the freight train and has made two or three trips in the night on the mixed train, that the railroad company has constructed its bridges wide enough to enable him safely to pass along the side of a car as the train crosses over them. (Utah) Leach v. Oregon Short Line R. R. Co., 708.

Master's Liability for Tort of Trainman.

24. **RAILROADS—Liability for Tort of Trainman.**—The act of a trainman in throwing bricks at a dwelling-house near the track from a moving train does not render the railroad company employing him liable therefor. (S. C.) Davenport v. Charleston etc. Ry., 598.

MECHANIC'S LIEN.

1. **MECHANICS' LIENS—Enforcement.**—If a mechanic's lien claim and the complaint in an action to foreclose it describe a twelve acre tract as that on which the lien is demanded, while the evidence shows that only one acre thereof can be so subject, the statutory requirement of a claim for lien describing the land is satisfied, and it is the duty of the court to ascertain the one acre within the parcel so claimed which should contain the building and be subjected to the lien. (Wis.) Halsey v. Waukesha Springs etc. Co., 838.

2. **MECHANICS' LIENS—Destruction of Building.**—A mechanic's lien having once attached to land is not detached by the total destruction of the building which formed the basis for the lien. (Wis.) Halsey v. Waukesha Springs etc. Co., 838.

MINES AND MINERALS.

MINING CLAIM—Location by Alien.—The location of a mining claim by an alien is not void, but merely voidable. It can be attacked only by the government, and may be cured by his grant to a citizen. (Utah) Stewart v. Gold and Copper Co., 719.

MINORS.

See Infants.

MORTGAGES.

In General.

1. **MORTGAGES—Evidence of Renewal Note.**—If a mortgage is given to secure a note, and it is provided in the instrument that the payee agrees to renew it from time to time, evidence is admissible to show that a note bearing a later date is a renewal of that first given. (Ga.) Garmany v. Lawton, 207.

2. **MORTGAGES—Receivership Litigation—Liability for Costs.**—If a mortgagee is made a defendant in an action seeking to place

the property of the mortgagor in the hands of a receiver, and is involuntarily, by injunction, prevented from foreclosing his mortgage, and does no more than contest the appointment of a receiver, he is not liable for the costs and expenses of the proceeding, but if he comes in and makes himself a party complainant, and sets forth the fact of his mortgage and voluntarily litigates with the other creditors, he thereby recognizes the necessity for the petition and ratifies the filing of it, and thus becomes chargeable with his proportion of the expenses of the suit. (Ga.) Garmany v. Lawton, 207.

3. **MORTGAGE SALE—Collateral Attack—Purchaser's Deed.**—Where a sale has been made under a power contained in a mortgage or a trust deed, and a deed has been made to the purchaser by the trustee or sheriff, it will be presumed on collateral attack in an action at law that the requirements of the mortgage and the statutes as to notice have been complied with, and that the proceedings have been regular; and evidence, other than the deed and its recitals, is unnecessary to show legal title in the purchaser. (Wyo.) Matthews v. Nefsy, 1020.

Deed Absolute.

4. **MORTGAGE, Deed Absolute in Form may be Shown to be.**—A bill of sale or a deed absolute in form may be shown to be a mortgage in an action at law. (Wis.) Smith v. Pfluger, 911.

5. **MORTGAGE, Conveyance Absolute in Form, When Deemed to be a.**—The mere form of an instrument cuts very little figure in respect to whether it is enforceable as a mortgage or not, upon its character being questioned in either a legal or an equitable action. If its purpose is security, and this is established i any action involving the subject, the instrument is treated as a mortgage and nothing else. (Wis.) Smith v. Pfluger, 911.

6. **MORTGAGE, Parol Evidence to Show that a Deed Absolute in Form is.**—In code states, where what were formerly actions at law and suits in equity are triable in the same court, the true character of a conveyance absolute in form given as a mortgage may be shown by evidence aliunde, including parol evidence. (Wis.) Smith v. Pfluger, 911.

Registration and Notice.

7. **MORTGAGES—Purchaser—Notice.**—If a mortgage on land securing a bond refers to such bond for conditions, and the bond is not recorded, the bond and mortgage are not notice to a purchaser of the land subject thereto of any other conditions than those appearing on the record of the mortgage. (S. C.) Equitable Building etc. Assn. v. Corley, 615.

8. **MORTGAGES—Purchaser—Notice.**—If a purchaser of land covered by a mortgage has actual notice of the conditions of the mortgage, though such conditions pear only in a bond secured by it, and not recorded, he is bound by such notice. (S. C.) Equitable Building etc. Assn. v. Corley, 615.

9. **MORTGAGE, Record of, of What Gives Notice.**—The record of a mortgage affords constructive notice only of its existence and ownership thereof by the mortgagee named therein, not of the assignment of such mortgage to another. (Wis.) Friend v. Yahr, 924.

Payment and Satisfaction.

10. **MORTGAGE, Record of Satisfaction of, Right to Rely on.**—A person in taking a mortgage on real estate may rely on the rec-

ord of a satisfaction by the record owner of a prior mortgage on the same property, in the absence of knowledge, actual or constructive, of the ownership of such prior mortgage by some other person than such owner. (Wis.) Friend v. Yahr 924.

11. **PAYMENT OF MORTGAGE to Agent, Other Use Than in Money.**—A person in possession of a note belonging to another, secured by a mortgage upon real estate, with authority to collect the same, cannot rightfully accept in payment anything but money. Nevertheless, if such person takes from the mortgagor a new mortgage on the real estate covered by the first mortgage for the purpose of providing means with which to pay off the latter, and thereafter by the use of such second mortgage he acquires such means before his agency to collect is terminated, such authority is thereby executed and the first mortgage indebtedness and lien extinguished. (Wis.) Friend v. Yahr, 924.

12. **MORTGAGE, Agency to Collect and Presumption of Its Continuance.**—If a person intrusted with authority to collect a mortgage indebtedness enters upon the execution of such authority and continues efforts in that regard until he obtains the necessary money therefor, nothing appearing to the contrary, the agency to collect and possession of the securities by the agent is to be presumed to continue correspondingly, and the legal effect of obtaining the money is the extinguishment of the note and mortgage, regardless of whether such money in due course, or otherwise, reaches the rightful owner. (Wis.) Friend v. Yahr, 924.

13. **MORTGAGE, Satisfaction of Record not Necessary.**—Payment of an indebtedness on a note secured by a mortgage on real estate extinguishes the mortgage lien without any satisfaction thereof of record or in writing. (Wis.) Friend v. Yahr, 924.

14. **MORTGAGE, Satisfaction of, by Whom may be Executed.**—A mortgage having been extinguished by payment of the indebtedness, it is not necessary to valid record evidence thereof that a satisfaction piece shall be executed by the actual or apparent owner of such indebtedness for delivery to the mortgagor, or that there should be such delivery. (Wis.) Friend v. Yahr, 924.

Assignment.

15. **ASSIGNMENT OF MORTGAGE, Bona Fides of the Transaction.**—If a person, acting for himself or another, for value acquires a promissory note before maturity, secured by a mortgage upon real estate, taking the title to such mortgage in the name of another by his consent, evinced by a general power of attorney, but without his knowledge as to the particular transaction, and thereafter such other by consent of such third person, evinced by such power of attorney, but without his knowledge as to the particular transaction, assigns his security in writing to a fourth person, the assignment being neither witnessed nor acknowledged, the bona fides of the transaction as to the latter or as to such first person is not affected by the mere use of the third person's name as assignee and subsequently as assignor, nor by the fact that he was not pecuniarily interested in the transaction, nor by the circumstance that the second instrument of assignment was not so executed as to be entitled to record. In the circumstances above stated the final holder of the legal title to the security can rely on the bona fides of the transaction between the vendor and the person dealing with him in the first transaction. (Wis.) Friend v. Yahr, 924.

16. **MORTGAGES—Assignment—Erasure of Assignment and Redelivery.**—If a mortgagee assigns his mortgage by indorsing the as-

signment on the back thereof, and having it acknowledged before a notary, the subsequent erasure of such assignment and redelivery of the mortgage to the mortgagee does not reinvest the title in him, and it remains where the assignment has placed it. (Ala.) Carter v. Smith, 36.

17. **MORTGAGE—Assignment—Sufficiency of Description.**—There is a sufficient identification of the mortgage in an assignment thereof which gives the names of the mortgagor and mortgagee and the book and pages of the record where it is recorded. (Wyo.) Matthews v. Nefsy, 1020.

18. **MORTGAGES—Assignment by Corporation.**—If the assignment of a mortgage is signed, "The Bailey Loan Co., by H. N. Johnson, Treas.," and bears the seal of the company, the fact that the notes and mortgage have been delivered to the assignee by the company tends to show that the treasurer was authorized to make the assignment, and amounts to a ratification of his act in so doing if it was done without previous authority. (Wyo.) Matthews v. Nefsy, 1020.

See Receivers; Subrogation.

MUNICIPAL CORPORATIONS.

Ordinances.

1. **MUNICIPAL CORPORATIONS—Ordinances—Injunction.**—An action to have a municipal ordinance declared invalid, and the city authorities enjoined from enforcing it, on the ground that by its enforcement plaintiff's property will be injured, is not an action in tort, but one for equitable relief. (S. C.) Riley v. Town of Greenwood, 592.

2. **MUNICIPAL CORPORATIONS — Ordinances—Validity.** — A city ordinance directing and compelling the removal of a fence erected on private property, not subject to a public easement, is illegal and void, as an attempt to take private property without compensation. (S. C.) Riley v. Town of Greenwood, 592

3. **MUNICIPAL CORPORATIONS—Invalid Ordinances.**—Prohibition is not the appropriate remedy for relief from an invalid city ordinance which is an illegal attempt to take private property without compensation and without due process of law. (S. C.) Riley v. Town of Greenwood, 592.

4. **MUNICIPAL CORPORATIONS — Illegal Ordinance — Injunction.**—If a municipal corporation by means of a city ordinance is attempting to carry into effect an illegal act, it may be enjoined, provided there is ground for equitable relief. (S. C.) Riley v. Town of Greenwood, 592.

5. **MUNICIPAL CORPORATIONS—Invalid Ordinances—Injunction.**—If a city ordinance requires the mayor of the city to remove any obstruction interfering with the free use of a certain alley, and by virtue of such ordinance he is about to remove a fence from private property, not subject to a public easement, there is a continuing menace to the rights of the owner of such property authorizing equitable relief by injunction. (S. C.) Riley v. Town of Greenwood, 593.

6. **MUNICIPAL CORPORATIONS—Ordinance Making Penal an Act Prohibited by Statute.**—A municipality cannot by ordinance prohibit that which is already made penal by state statute, unless there is express and specific legislative authority therefor. (Ga.) Thrower v. Atlanta, 147.

7. **MUNICIPAL CORPORATIONS—Ordinance Prohibiting Gambling Already Prohibited by Statute.**—A city cannot, in the absence

of express legislative authority, make penal acts which are already prohibited by state statute against keeping gaming-houses. (Ga.) Thrower v. Atlanta, 147.

License Fees and Taxes.

8. **MUNICIPAL CORPORATIONS—Ordinances—License for Issuing Trading Stamps.**—A city ordinance requiring each merchant within the city issuing any trading stamps, in connection with his business, to pay a license of one hundred dollars therefor, and fixing a like penalty for each stamp issued without having taken out such license, is unconstitutional and void as a palpable attempt, under the guise of a license tax, to fix a penalty for conducting a lawful business in a certain way. (Ala.) City Council of Montgomery v. Kelly, 43.

9. **MUNICIPAL CORPORATIONS—Telephone Corporation, Power to Impose Restrictions Upon.**—Where the legislature, by statute, has conferred on telephone corporations authority, subject only to the provision that they shall not obstruct or incommode the public use of any road, highway, bridge, stream or body of water, a municipal corporation has no power to impose any condition on a telephone corporation, except such as it may lawfully impose under its power to control and regulate the streets, alleys and public grounds, and prevent the encumbering thereof, and its general police power. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

10. **MUNICIPAL CORPORATIONS—License Fees and Telephone Corporations.**—Where the legislature confers authority on a telephone corporation, subject only to the provision that it shall not obstruct or incommode the public use of any road, highway, bridge, stream or body of water, a municipal corporation has no power to exact a license fee from such a corporation for the privilege of constructing, maintaining and operating its telephone lines on the streets of the city. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

11. **CONSTITUTIONAL LAW—License on Occupations—Power to Impose.**—The Power Rests in the State, and not in Any Municipal Corporation, to determine what occupations shall be licensed. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

12. **A MUNICIPAL CORPORATION cannot Exact a License Fee as a Means of Raising Revenue** where the power to license has not been delegated to it. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

13. **LICENSE Fee, When Must be Deemed Imposed for Revenue, and not for Supervision or Inspection.**—An ordinance requiring telephone and telegraph corporations to apply annually for a license to maintain, for the ensuing year, the poles and cross-arms then erected and to pay, for the use of the city, one dollar for each pole authorized to be maintained thereunder, and providing that the revenue derived from the license shall become a part of the general city fund, must be regarded as imposing a license fee for revenue and not for inspection and supervision. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

14. **MUNICIPAL CORPORATIONS, License, Power of the Courts to Determine Purposes of.**—Where the power to license exists, a reasonable discretion is vested in the municipality, but the courts have a right to look into ordinances with a view of determining whether they are passed for the purposes of revenue, although sought to be upheld as police regulations. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

15. **LICENSE FEES, Power to Impose for Inspection and Supervision, Duty of Courts to Limit Amount of.**—Though a city has the right to impose reasonable charges for inspection and supervision, it should not be permitted, under the guise of that power, to collect large amounts of revenue for the benefit of the city, regardless of the amount necessary for such inspection and supervision, and where the court can see that revenue, and not regulation, is the aim, and not the incident, and no power is given to license the occupation, the ordinance is void. (Wis.) Wisconsin Tel. Co. v. Milwaukee, 886.

Obstruction of Stream.

16. **MUNICIPAL CORPORATION — Obstruction of Stream — Liability for Overflow.**—Where a harrow spring company builds a warehouse in a city across a creek on land owned by it, and the harrow teeth therein stored fall through the floor and catch drift material in a manner not open to the observation of municipal employés cleaning out the creek as a health measure, and this obstruction in conjunction with heavy rains causes an overflow of the stream flooding private property, the city is not liable for the obstruction. (Mich.) A. L. Lakey Co. v. Kalamazoo, 338.

17. **MUNICIPAL CORPORATIONS—Obstruction of Stream—Liability for Overflow.**—Where a city drains surface water into a creek flowing through it, and accumulations of mud and sand in the bottom of the stream are thereby occasioned, it is not liable for such obstruction when, during heavy rains, the stream overflows to the injury of private property. (Mich.) A. L. Lakey Co. v. Kalamazoo, 338.

See Officers.

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Municipal Corporations, crimes, implied power of to make criminal and punish acts already criminal and punishable under the general laws, 150-152.
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NEGLIGENCE.

In General.

1. **NEGLIGENCE of Driver not Imputed to Infant.**—The negligence of the driver of a vehicle is not imputable to a minor riding

with him at his invitation, so as to bar an action against a railroad company for her negligent killing at a crossing. (Mich.) Hampel v. Detroit etc. R. R. Co., 275.

2. **NEGLIGENCE.**—Evidence as to other accidents causing injury to persons and property not relevant to the case on trial, as well as opinions with reference to matters as to which opinion evidence is inadmissible, is properly excluded. (Fla.) Florida Central etc. R. R. Co. v. Mooney, 73.

3. **NEGLIGENCE—Proximate Cause.**—If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote. (Ala.) Alabama Great Southern R. R. Co. v. Vail, 23.

Manufacturer's Liability.

4. **NEGLIGENCE—Sale of Explosive—Privity.**—Where a bottler of champagne cider sells it without knowledge that the bottles are charged improperly, he is not liable to the buyer's employé who is injured by the explosion of one of the bottles. (Mich.) O'Neill v. James, 321.

5. **NEGLIGENCE—Manufacturer's Liability to Third Person.**—A manufacturer who makes, bottles and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, is under legal duty to see that in the process of bottling no foreign substance is mixed with such beverage which, if taken into the human stomach, will be injurious. One who, relying on such obligation without negligence, swallows pieces of glass while drinking such beverage from a bottle, may recover for injuries sustained thereby. (Ga.) Watson v. Augusta Brewing Co., 157.

6. **NEGLIGENCE—Manufacturer's Liability to Third Person—Damage for Mental Suffering.**—If a manufacturer of soda-water makes, bottles, and sells it to retail trade, a third person who purchases a bottle thereof, and in drinking it swallows several pieces of glass, which are subsequently removed from his stomach, and he is apparently restored to his former condition of health, may recover of the manufacturer for his mental suffering caused by fear of death while the glass was in his stomach, but not for a fear, after its removal, that some time in the future he will again suffer from the injury caused by the glass before its removal. (Ga.) Watson v. Augusta Brewing Co., 157.

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NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—Refusal to Grant.—The trial court may, in its discretion, refuse to set aside a verdict and grant a new trial, when the sole ground for such application is the request of both parties to have another trial. (W. Va.) Guyandot Valley Ry. Co. v. Buskirk, 785.

OFFICERS.

Appointment and Title—Quo Warranto.

1. **CONSTITUTIONAL LAW—Appointment to Office.**—A statute authorizing the governor to appoint the members of the board of fire and police commissioners of the city of Omaha is constitutional. (Neb.) State v. Broatch, 477.

2. **RES ADJUDICATA—Constitutionality of Statute, When not Conclusively Shown.**—In an action involving the right to an office, the title to which is dependent on the constitutionality of the statute, the only matter which becomes res adjudicata is title to the office for the term involved, though in reaching a conclusion on the subject the court necessarily affirms that the statute on which the title of one set of claimants rests is unconstitutional. (Neb.) State v. Broatch, 477.

3. **RES JUDICATA—Quo Warranto—Judgment in, When Conclusive on the Officers for the Term Involved.**—If a proceeding in quo warranto is brought to determine the right to an office, and the judgment therein is in favor of one claimant and against another on the ground that the statute authorizing the appointment of the latter is unconstitutional, the judgment is conclusive on the right to the office for the term involved, though the court should reach the conclusion that the ground on which the former judgment was based, namely, the unconstitutionality of the statute, is not maintainable. (Neb.) State v. Broatch, 477.

4. **RES JUDICATA—Quo Warranto Judgment in Effect upon Appointees for a Subsequent Term.**—A judgment in quo warranto that the appointees of the governor are not, and that the appointees of the mayor are, entitled to an office, based on the opinion of the court that the statute authorizing the former to appoint is unconstitutional, does not affect claimants of the office for a subsequent term appointed respectively by such governor and mayor, nor bind the court to adhere to its former ruling that such statute is unconstitutional. (Neb.) State v. Broatch, 477.

Officers De Facto.

5. **OFFICERS DE FACTO Under Unconstitutional Statute.**—A person commissioned by the governor as a circuit judge, and exercising the duties of that office under an unconstitutional statute and a void appointment, but at a time when and a place where the circuit court for a particular county could be legally held, is a de facto circuit judge, and his acts as such are as effectual when they concern the rights of third persons or the public as if they were the acts of a de jure officer, until his title to his office is adjudged insufficient. (Ala.) Ex parte State ex rel. Attorney General, 20.

6. **OFFICERS DE FACTO—Validity of Acts of.**—The acts of a de facto officer are valid in so far as they concern the public or third persons who have an interest in the things done until his title to the office is adjudged insufficient. (Ala.) Ex parte State ex rel. Attorney General, 20.

Reimbursement for Expenses.

7. **MUNICIPAL CORPORATIONS—Reimbursement of Officer for Legal Expenses.**—A municipality has common-law power to reimburse a police officer for expenses and attorney fees incurred in the defense of an action for false imprisonment, if the officer was acting in good faith in the exercise of his duties. (Minn.) City of Moorhead v. Murphy, 345.

OIL LEASES.

See Landlord and Tenant, 6, 7.

OPTION TO PURCHASE.

See Specific Performance; Vendor and Vendee.

ORDINANCES.

See Municipal Corporations.

PARTIES.

1. PARTIES DEFENDANT in Suit for Injunction.—In a suit to enjoin further proceedings for the garnishment of exempt wages of a judgment debtor due him from his employer, a railway corporation, and to prevent the payment of such wages to any person except himself, such corporation is a proper party defendant. (Neb.) Seiver v. Union Pac. R. R. Co., 393.

2. JURISDICTION Where There are Two or More Defendants.—The defendant who may be sued in the county where the action is brought must be a necessary and not a sham defendant joined solely for the purpose of bringing in the defendants served in another county. (Neb.) Seiver v. Union Pac. R. R. Co., 393.

PAYMENT.

PAYMENT—Burden of Proof.—If, under the terms of a written obligation, a specific sum of money becomes due and payable at a certain time, the production of such obligation establishes prima facie that the amount therein stipulated to be paid is due, and it is not incumbent on the person holding such obligation, in the first instance, to show either that demand has been made, or that there has been a failure to comply therewith. (Minn.) Montgomery v. Leuwer, 349.

See Judgments, 22, 23; Mortgages, 10-14.

PENALTIES.

PENALTIES—Repeal of Penal Statute.—In civil actions of a penal character depending upon a statute where the penalty inures to the state, the repeal of the statute pending an appeal deprives the appellate court of any power to render any judgment by which the penalty may be enforced, and the effect of the repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law. This rule applies to a civil suit for the recovery of a penalty not prescribed as a punishment for a crime, although it does not apply in Florida to the punishment of a criminal for the commission of a crime, because of a constitutional saving clause. (Fla.) Pensacola etc. R. R. Co. v. State, 67.

PLEADING.

In General.

1. PLEADING.—Demurrer does not Lie to a declaration because it claims other or greater damages than the case made legally entitles the plaintiff to recover. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

2. PLEADING—Demurrer.—A departure in pleading is a matter of of substance and ground for a general demurrer. (Fla.) Tillis v. Liverpool etc. Ins. Co., 89.

3. **PLEADING, Complaint, Sufficiency of, When may be Questioned.**—The question of the sufficiency of the petition, and whether it states a cause of action, may be raised at any stage of the proceedings, even in the supreme court on appeal, and is open for consideration in the appellate court at any time until and including the filing of a motion for a rehearing. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

4. **PLEADING, Defects in Complaint, Parties not Estopped from Urging.**—If a complaint for the appointment of a receiver does not state a cause of action, nor warrant the granting of any equitable relief, the participation of interveners and others in the proceedings had in the trial court cannot preclude them from urging the insufficiency of such complaint on appeal to support the orders, judgments and decrees of the trial court. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

5. **PLEADING—Complaint, Prayer of cannot Supply Defects in.** Though the prayer of a petition contains a request for general equitable relief, it cannot be extended so as to warrant the granting of relief not embraced within and comprehended by the allegations of the pleading. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

6. **PLEADINGS—Objection to Evidence.**—In the absence of a motion by defendant to strike out certain allegations in a complaint, he cannot object to evidence in support of them. (S. C.) Milhous v. Southern Railway, 620.

Amendments.

See Actions.

7. **PLEADING AND PRACTICE.**—Leave to amend a pleading may be granted during a term of court without notice to the opposite party of application therefor even though the case has been submitted upon demurrer by brief. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

8. **PLEADING AND PRACTICE.**—If a declaration is permitted to be amended pending the hearing of a demurrer thereto, the defendant must be permitted to demur or plead to such amended declaration. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

PLEDGE.

See Trover and Conversion.

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PRINCIPAL AND AGENT.

In General.

1. **PRINCIPAL AND AGENT—Agent's Personal Liability for Act of Misfeasance.**—If an agent fails to use reasonable care or diligence in the performance of his duty, he is personally responsible to a third person who is injured by such misfeasance, not as an agent but as a wrongdoer. (Ga.) Southern Ry. Co. v. Grizzle, 191.

2. **PRINCIPAL AND AGENT—Insanity for Agent.**—For the insanity of the agent to excuse his principal for an act done within the scope of his authority, such insanity must have been so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. (Ga.) Central of Georgia Ry. Co. v. Hall, 170.

3. **AGENCY—Authority of Agent—Presumption.**—Everyone who deals with an agent is presumed to know the extent of his authority, and if he exceeds his express or apparent authority, his acts bind only himself, but not his principal, unless ratified by the latter. (W. Va.) Cobb v. Glenn Boom & Lumber Co., 734.

4. **EVIDENCE—Declarations to Prove Representative Capacity.**—A witness cannot establish his representative capacity by his own declarations alone. (S. C.) General Electric Co. v. Southern Ry., 600.

Power of Attorney.

5. **POWER OF ATTORNEY—Revocation.**—At common law the revocation of a power of attorney to convey lands, to be effectual, must be brought to the personal notice of the agent. (Wis.) Best v. Gunther, 851.

6. **POWER OF ATTORNEY Recorded—Revocation.**—A power of attorney to mortgage or convey lands is not within statutory provisions declaring the effect of recording conveyances of real estate, and the fact that after such power has been recorded a revocation thereof is also recorded does not terminate the power, nor affect a mortgage subsequently executed thereunder, in the absence of actual notice of such revocation to the agent. (Wis.) Best v. Gunther, 851.

7. **POWERS OF ATTORNEY—Revocation.**—A statute providing that powers of attorney to convey lands may be recorded, and when so recorded shall not be deemed revoked by any act of the party who executed them unless the instrument of revocation be also recorded in the same office, does not affect a power of attorney to mortgage land which has been recorded, and as to which a revocation thereof has also been recorded, if notice of the revocation has not been given to the agent. (Wis.) Best v. Gunther, 851.

PRINCIPAL AND SURETY.

1. **SURETIES.—By the Voluntary Payment of an Obligation, a** surety cannot make his cosurety liable. Compulsory payment by the surety is essential, but he is not required to wait until a creditor extorts payment from him. (Wis.) Fanning v. Murphy, 946.

2. **SURETIES—Payment by One, When Will not be Deemed Voluntary as Against Another.**—Whenever a surety pays a debt because his liability has become fixed by his principal's default, the payment is not voluntary. (Wis.) Fanning v. Murphy, 946.

3. **SURETIES, Right of to Contribution When One has Taken up Indebtedness and Procured an Assignment.**—Where a surety's liability has become fixed by the default of his principal and the surety takes up the note for the sole purpose of discharging his liability as surety and preserving his rights of subrogation and contribution, the mere fact that he does so in the form of a purchase of the securities does not militate against its being a payment for the purpose of enforcing contribution from a cosurety. (Wis.) Fanning v. Murphy, 946.

4. **SURETIES—Delay in Coercing Payment of Indebtedness.**—The payee of an instrument having a principal obligee and a surety owes no duty of active vigilance to the latter to enforce the collection of the indebtedness. The way is open to the surety, at any time after default of the principal, to pay the debt and reimburse himself by enforcing the obligation of the principal and of the cosureties, if there be any. (Wis.) Fanning v. Murphy, 946.

5. **SURETIES—Extension of Time, Payment of Interest, as a Consideration for.**—The payment of interest on a debt according to the terms of an obligation does not constitute any consideration for an agreement to extend the time for the payment of the principal. (Wis.) Fanning v. Murphy, 946.

6. **SURETY'S AGREEMENT Extending Time for Payment, When Sufficient to Release Surety.**—A valid agreement for the extension of the time for the payment of a note must have all the essentials of a binding contract and be reasonably definite as to time. There must be a good equivalent for the extension, such a consideration as will so tie the hands of the obligee as to disable him from enforcing the obligation until the expiration of the time agreed upon. That equivalent must be something other than what the law would have awarded to the obligee in case of a mere extension of time of performance, regardless of any pretense of contract to do so. It must be something different from, and entirely additional to, what would accrue in favor of the obligee if he merely allowed the note to run from day to day. (Wis.) Fanning v. Murphy, 946.

7. **SURETY'S EXTENSION of Time for Payment, Valid Agreement for, When not Shown.**—The fact that the payee of an obligation indorses thereon a memorandum of the extension of time for payment and of a reduction of the rate of interest, followed by the receipt of such diminished interest, does not establish a binding contract for an extension, and thereby release his surety. (Wis.) Fanning v. Murphy, 946.

8. **SURETIES—Extension of Time of Payment, What is not.**—The mere fact that after a request for the extension of the time for payment, and the granting thereof, the creditor indorses the result upon his loan register, does not establish an enforceable agreement for such extension or cut any figure whatever. (Wis.) Fanning v. Murphy, 946.

PROBATE LAW.

See Executors and Administrators; Wills.

PROCESS.

JURISDICTION to Issue Summons to Another County.—The true test to determine whether or not the venue is proper, so that the summons may issue to another county, is whether the defendant served in the county where the suit is brought is a bona fide defendant to the action—whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendant, and in equity actions may be added the inquiry whether or not plaintiff can obtain full, suitable, and satisfactory relief without joining such party, and binding him by the terms of the judgment or decree. (Neb.) Seiver v. Union Pac. R. R. Co., 393.

PROHIBITION, WRIT OF.

1. **PROHIBITION.**—The writ of prohibition lies only against judicial tribunals and against judicial action. (W. Va.) McWhorter v. Dorr, 815.

2. **PROHIBITION—Election Contest.**—The writ of prohibition does not lie to prevent a member of a special and subordinate legislative tribunal, not a part of the judicial department, from acting in the hearing and determination of an election contest. (W. Va.) McWhorter v. Dorr, 815.

PROTEST.

See Bills and Notes.

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Public Lands, surveys of made by the government are conclusive, 677, 678.

surveys of made by the government cannot be changed by the courts, 679.

QUIETING TITLE.

CLOUD ON TITLE—Mortgages.—A mortgage including land not owned by the mortgagee is a cloud on the title of the owner of such land. (Wis.) Pritchard v. Lewis, 872.

QUO WARRANTO.

See Officers.

RAILROADS.

Crossings—Misfeasance of Engineer.

1. **NEGLIGENCE.**—Evidence tending simply to show that the engine whistle was not sounded nor the bell rung as the train approached a crossing, will not support a charge of wanton, willful, or intentional negligence on the part of the railroad company. (Ala.) Nashville etc. Ry. Co. v. Harris, 29.

2. **RAILROADS—Liability of Engineer.**—The act of a railroad engineer in running his train over a public crossing in violation of statutory requirements as to the giving of signals is an act of misfeasance, rendering him individually liable to a third person injured by such act. (Ga.) Southern Ry. Co. v. Grizzle, 191.

3. **RAILROADS—Act of Misfeasance by Engineer—Joint Liability.**—A railroad company and its engineer are jointly liable when the

sole ground of liability is a negligent act of misfeasance on the part of such engineer. (Ga.) Southern Ry. Co. v. Grizzle, 191.

4. RAILROADS—Foreign—Place of Suit—Residence.—A foreign railroad company operating within a state under whose laws it is a resident and its engineer are jointly liable for the tortious act of the latter, and may be jointly sued in the county where such act was committed, although the residence of such engineer is in another county in the state. (Ga.) Southern Ry. Co. v. Grizzle, 191.

Trespassing Infants.

5. RAILROADS—Trespassing Infant.—A child, incapable by reason of tender age, from exercising discretion, or of being guilty of contributory negligence, may become a trespasser upon a railroad track upon the same facts that would impress that character upon a person of legal discretion. (Ala.) Nashville etc. Ry. Co. v. Harris, 29.

6. RAILROADS—Trespassing Infant.—If an infant one and one-half years of age, goes upon a railroad track at a crossing, and, seeing a train approaching, turns up the track, stops, and stands gazing at the train, such child becomes a trespasser upon the track, and the railroad company owes it no other duty than to resort to all reasonable means to avoid injuring it after the railroad servants become aware of the presence of the child, and of its peril. (Ala.) Nashville etc. Ry. Co. v. Harris, 29.

7. RAILROADS — Trespassing Infant.—If an infant trespasser upon a railroad track would not have heeded signals of warning if they had been given at a crossing, a failure to give them does not render the railroad company liable for injury to such trespasser. (Ala.) Nashville etc. Ry. Co. v. Harris, 29.

See Carriers; Master and Servant.

RECEIVERS.

1. RECEIVERS.—The Appointment of a Receiver is not Justified Unless it affirmatively appears that there is a reasonable possibility that the plaintiff will ultimately succeed in obtaining relief in the suit in which the receivership is asked. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

2. CORPORATIONS, Receiver of Mortgagee, When not Entitled to.—A mortgagee of corporate property is not, because of anticipated default in the indebtedness, a possible inability to continue much longer the business conducted by it, threatened attachments, financial weakness or insolvency, and, in the event of the suspension of business, a consequent depreciation in the value of the mortgaged property, entitled to have a receiver appointed, the corporate property sequestered, the business conducted by a receiver until, by a receiver's sale, the estate may be sold subject to the mortgage indebtedness and the affairs of the corporation terminated. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

3. CORPORATIONS, Receivers of.—A court of equity will not appoint a receiver for the purpose of seizing the property of a corporation and winding up its affairs without statutory authority and without the case being brought within the equitable principles sanctioned and taken cognizance of by courts of chancery in England. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

4. RECEIVER, Appointment of, When not Authorized.—A Suit cannot be Maintained Solely for the Appointment of a Receiver. Receivership is purely an ancillary remedy. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

5. **RECEIVER FOR CORPORATION.**—A court has no power to appoint a receiver for corporate property upon grounds which would not authorize such appointment if the defendant were a natural person. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

6. **RECEIVER, Property of Which may be Authorized to Take Possession.**—On a petition by a mortgagor for the appointment of a receiver, with a prayer that he be authorized to take possession of the property covered by the mortgage, an order authorizing him to take possession of all other property belonging to the defendant is unauthorized and void. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

7. **RECEIVER, Consent of Corporation to Appointment of.**—The appointment of a receiver of a corporation, though consented to by it, is void if the pleadings state no ground for such appointment. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

8. **RECEIVER, Suit, When not Commenced and Pending so as to Authorize the Appointment of.**—A receiver can be appointed only in a suit actually commenced and pending, and it is not commenced and pending, though a complaint or petition, together with an answer, is filed, if neither contains a statement of facts authorizing the appointment of a receiver or the maintenance of an action for any other purpose. (Neb.) Vila v. Grand Island etc. Storage Co., 400.

See Mortgages, 2.

RECORDS.

RECORD TITLE, Right to Rely upon.—A person in dealing with another in respect to real estate may rely upon the record title to the property in the absence of actual knowledge of the title in fact, or of facts sufficient to put him on inquiry in respect thereto. (Wis.) Friend v. Yahr, 924.

See Mortgages, 7-10; Principal and Agent, 6.

REMOVAL OF CAUSES.

REMOVAL OF CASES.—If a complaint states a good joint cause of action against a foreign railroad company and its engineer, who is a resident of the state, and a recovery is sought solely on the ground that such engineer negligently and wrongfully failed to comply with the requirements of the statute, other averments in the complaint made as mere matter of inducement, and not as ground for a recovery, do not make a separable controversy between the railroad company and the plaintiff so as to authorize an order of court removing the case to a national court. (Ga.) Southern Ry. Co. v. Grizzle, 191.

REPLEVIN.

1. **REPLEVIN—Possession as Evidence of Title.**—Since possession is prima facie lawful and prima facie evidence of title, one who has been deprived of his possession by a trespasser may, without other proof of title, maintain replevin to recover the property. (Wyo.) Cheeseman v. Fenton, 1010.

2. **REPLEVIN.**—If the Defendants in Replevin claim under a writ of attachment, but fail to connect themselves with the possession of the officer under the writ, it is error, although the plaintiff fails to prove title or right of possession in himself, to award a judgment in favor of the defendant for the value of the property, on the theory that it is less than the value of the writ. The only judg-

ment to which they are entitled, if any, is for costs. (Wyo.) Cheeseman v. Fenton, 1010.

3. REPLEVIN—Attached Property.—Where an Officer seizes property under an attachment writ which is in the possession of a stranger to the attachment suit under a claim of ownership, it is incumbent on the officer, when sued in replevin by such person for a recovery of the property, to show not only a writ valid on its face, but the regularity of the attachment proceedings. (Wyo.) Cheeseman v. Fenton, 1010.

4. REPLEVIN—Attachment Property.—When an Officer attaches property in the possession of a stranger who purchased it at a foreclosure sale, he is not in a position, when sued in replevin by that person, to question the latter's title, without showing the validity of his writ on its face and the regularity of the attachment proceedings. (Wyo.) Cheeseman v. Fenton.

RESERVATIONS AND EXCEPTIONS.

See Deeds, 4-8.

RES GESTAE.

See Evidence, 5, 6.

RES JUDICATA.

See Judgments, 9-21.

ROBBERY.

1. ROBBERY.—Stealthily Filching Loose Property from the pocket of another, without using more force than is necessary to remove the property from such pocket, is not robbery, but larceny. (Fla.) Colby v. State, 87.

2. ROBBERY—Taking Money from Pocket of Another.—If one struggles or clinches with another in an effort to overpower the latter, and for the purpose of enabling him to secure the money in the pocket of such other, he is guilty of robbery; but if the force thus used is merely in an effort to escape and avoid arrest, he is not guilty of robbery, although prior to such clinch he is stealthily attempting to filch the money from the pocket of such other. (Fla.) Colbey v. State, 87.

RESTRAINT OF MARRIAGE.

See Wills, 15.

RULE IN SHELLEY'S CASE.

See Wills, 11-14.

SALES.

1. SALE, Election to Affirm, What Amounts to.—A suit to recover damages for a breach of warranty in a sale is an irrevocable election to affirm the sale. (Wis.) Davis v. Schmidt, 938.

2. SALES—Bill of Lading with Draft Attached—Reservation of Title.—If a seller ships goods with a bill of lading providing for a delivery to the consignee on payment of the draft attached, the seller prima facie reserves the title and right to the goods until full payment of the draft, and the purchaser obtains no right to their pos-

session by a tender of a less amount than that called for by the draft. (S. C.) Greenwood Grocery Co. v. Canadian etc. Co., 627.

Conditional Sale or Mortgage.

3. **CONDITIONAL SALE—Resale by Vendor—Deficiency Judgment.**—If a note given for the purchase price of chattels provides that the title shall not pass until the note is paid in full, and that the payee may, at any time, when he deems himself insecure, whether before or after the maturity of the note, take possession of the property and sell it, or retain it and consider the amount paid as compensation for wear and tear, the payee is entitled, in case he retakes the property and sells it for less than the amount remaining due, to sue the maker and recover such balance. (Mich.) Van Den Dosch v. Bouwman, 336.

4. **CONDITIONAL SALE or Chattel Mortgage.**—In determining whether a contract amounts to a conditional sale or a chattel mortgage, the intention of the parties controls; and this is ascertained from all the language used in the contract, the circumstances attending the transaction, and the conduct of the parties. Such a construction should be adopted, if possible, as will harmonize and give effect to all the terms and provisions of the contract. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

5. **CONDITIONAL SALE—Retention of Title by Vendor.**—A condition in a contract for the transfer of personal property that the title shall not pass from the vendor until the purchase price is paid in full is inconsistent with an absolute sale and a mortgage back. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

6. **CONDITIONAL SALE—Absolute Promise to Pay.**—An absolute obligation to pay the purchase price of a chattel, whether or not the vendor should retake possession of it, is not inconsistent with a conditional sale. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

7. **CONDITIONAL SALE or Chattel Mortgage.**—A contract note for the transfer of personal property which provides that the title shall not pass to the vendee until full payment of the purchase price and interest, and that the vendor may retake possession of the property at any time when he deems himself insecure, and sell the property and apply the proceeds on the note, or, without a sale, indorse the true value of the property on the note, the vendee to pay any balance due after the indorsement as damages and rental, amounts to a conditional sale rather than a chattel mortgage. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

8. **CONDITIONAL SALE—Conflict of Laws.**—In determining whether a contract is a conditional sale or chattel mortgage, it should be construed according to the law of the state where the parties resided, the property was situated, and the contract was made. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

9. **CONDITIONAL SALE—Practical Construction by Parties.**—In determining whether a contract is a conditional sale or a chattel mortgage, the supreme court will not be unmindful of the construction put upon the contract by both parties in the trial court. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

10. **CONDITIONAL SALES—Conflict of Laws.**—If a conditional sale is valid in the state where made, without recording, but the vendee, without the knowledge or consent of the vendor, thereafter removes the property to another state, and there sells it to a bona fide purchaser, the conditional vendor may recover the property in that state, notwithstanding his conditional sale is invalid there for want of recording. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

11. CONDITIONAL SALES.—The Lex Loci Contractus governs the validity of conditional sales. (Wyo.) Studebaker Bros. Co. v. Mau, 1001.

See Election of Remedies, 1; Negligence, 4-6.

SEALS.

See Covenants, 1; Deeds, 1.

SELF-DEFENSE.

See Homicide.

SHERIFF'S DEED.

See Judicial Sale, 4.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE Against Grantee with Notice.—A purchaser of real property with notice of a prior contract to convey it to another takes it subject to the equitable rights of the original contractor to a completion of his bargain, and may be compelled in equity to perform the contract of his vendor; and upon a bill filed by the original vendee against the vendor and such subsequent purchaser, the proper practice is to direct a specific performance of the contract by the subsequent purchaser, in whom resides the legal title. (Wyo.) Frank v. Stratford-Handcock, 963.

2. SPECIFIC PERFORMANCE—Mutuality of Obligation and Remedy.—The rule that there must exist, as a prerequisite to specific performance, both mutuality of obligation and remedy, has been very much narrowed in modern equity practice. (Wyo.) Frank v. Stratford-Handcock, 963.

3. SPECIFIC PERFORMANCE—Option to Purchase.—The doctrine that there must exist, as a prerequisite to specific performance, mutuality of obligation and remedy, does not apply to optional contracts of the sale of land, founded upon a sufficient consideration. purchtse. (Wyo.) Frank v. Stratford-Handcock, 963.

4. SPECIFIC PERFORMANCE—Option to Purchase.—An agreement to convey land, founded upon a proper consideration, may be specifically enforced, upon an acceptance and tender of the price within the time specified, and it is no objection that prior to such acceptance and tender no obligation rested upon the option holder to purchase. (Wyo.) Frank v. Stratford-Handcock, 963.

5. SPECIFIC PERFORMANCE—Tender—To Whom Should be Made.—If a lessor gives his lessee an option to purchase the premises during the term, but, while the option is still in force, conveys the property to a third person, the lessee may properly tender performance to the lessor, and thereupon he and his grantee with notice become bound to make a conveyance. (Wyo.) Frank v. Stratford-Handcock, 963.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **STATUTES—Classification of Counties.**—A statute relating to counties of a certain class, general in its terms and founded upon a proper and legitimate basis of classification, is general and not special, though but one county is embraced within the class affected by the statute. (Fla.) Givens v. County of Hillsborough, 104.

2. **STATUTES—Repeal.**—If two statutes upon the same subject are no necessarily inconsistent with each other, the later does not repeal the earlier. (Fla.) Hartford Fire Ins. Co. v. Redding, 118.

3. **CONSTITUTIONAL LAW—Title of Act.**—If a statute expresses in its title the object of the act, such title embraces and expresses any lawful means to achieve such object. (S. C.) Riley v. Charleston Union Station Co., 579.

4. **CONSTITUTIONAL LAW—Title of Statutes.**—A statute authorizing the incorporation of a union depot company does not violate a constitutional provision requiring that a statute shall relate to but one subject, which shall be expressed in its title, in that it authorizes railroad companies to subscribe to and hold its stock, and to guarantee its bonds. (S. C.) Riley v. Charleston Union Station Co., 579.

STRIKES.

See Trade Union.

SUBROGATION.

1. **SUBROGATION — Nature of Remedy.**—If one is compelled to pay a debt for which he is not personally liable in order to protect his interest in the property upon which such debt is a charge superior to such interest, he thereby becomes equitably entitled to have the prior lien preserved and enforced, so far as necessary for his protection against loss. (Wis.) Charmley v. Charmley, 827.

2. **SUBROGATION is Wholly** a creature of equity and exists entirely independent of contract relations. (Wis.) Charmley v. Charmley, 827.

3. **SUBROGATION—Payment of Lien.**—If a person pays off a lien claim on property for which he is not, but another is liable, so that such other would derive the benefit thereof, if his interest in the property were entirely relieved from such lien, and such person acts in the matter, not as a mere volunteer, but to protect his own interest in the property, such interest being either legal or equitable, present or contingent, equity immediately operates in favor of such person by preserving such lien claim to him with the same right to enforce it as the original owner possessed, to the extent that such person would otherwise suffer loss to such other's gain. (Wis.) Charmley v. Charmley, 827.

4. **SUBROGATION—When not Applicable.**—If a person paying off a lien on property is secondarily liable for the debt, there springs out of the transaction an implied promise by the one primarily liable to repay the money, and such promise does not rest on the law of subrogation, but is enforceable as a legal liability. (Wis.) Charmley v. Charmley, 827.

5. **HOMESTEADS—Subrogation to Mortgage.**—The principles of subrogation apply where a married woman, having an interest in a homestead, the title to which is in her husband, and which is encumbered by a mortgage to secure his debt, without request by him, but solely to protect her homestead right, pays off the encumbrance. (Wis.) Charmley v. Charmley, 827.

6. **SUBROGATION—Statute of Limitations.**—If there is merely the right of subrogation to an interest in property, not incident to any legal right, the statute of limitations commences to run upon the cause of action at the time it accrues to the person from whom it was derived by subrogation, and the devolution of such cause of action does not interrupt the running of the statute. (Wis.) Charmley v. Charmley, 827.

7. **SUBROGATION—Statute of Limitations—Payment of Lien by Married Woman.**—If a wife pays a mortgage on the homestead, which her husband has assumed, to prevent a foreclosure, without intending to relinquish her right to repayment, and the statute of limitations has already commenced to run against the mortgagee's right to foreclose, such statute is not suspended as to her right of subrogation, and that right is barred when the mortgagee's right to foreclose is barred. (Wis.) Charmley v. Charmley, 827.

SUMMONS.

See Process.

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SURETYSHIP.

See Principal and Surety.

SURVEYS.

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TELEPHONES AND TELEGRAPHS.

1. **TELEPHONE COMPANIES—Construction of Grant of Right of Way.**—A grant to a telephone company of the right to erect a line "over and along" certain property, with the right to place poles along the highway adjoining such property, does not confer any right to erect a line or place poles diagonally across the grantor's property. Such grants must be strictly construed. (S. C.) Zimmerman v. American Tel. etc. Co., 589.

2. **TELEGRAMS—Originals.**—The message sent to a telegraph office to be transmitted in reply to one received is the original, and not the message received at the place to which it is transmitted. (W. Va.) Cobb v. Glenn Boom and Lumber Co., 734.

See Contracts, 10; Corporations, 2; Evidence, 4; Municipal Corporations, 9-15.

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See Contracts by Telegraph.

THEATERS AND SHOWS.

1. **THEATERS—Rights of Proprietors.**—The proprietor of a theater is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply for, and be willing to pay for a ticket. (Pa. St.) Horney v. Nixon, 520.

2. **THEATERS—Ticket Contract—Right of Holder.**—If a proprietor of a theater sells a ticket thereto, it creates a contract between him and the holder, and for a breach thereof he is bound to respond in damages. (Pa. St.) Horney v. Nixon, 520.

3. **THEATERS — Tickets—License — Revocation — Damages.**—A theater ticket is a mere license to the purchaser which may be revoked at the pleasure of the theatrical manager, and upon such revocation, if the person holding the ticket attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser, and may be prevented from entering or may be removed by force, and his only remedy is by an action on the contract to recover the money paid and the damages arising from a breach of the contract, and he cannot maintain an action of tort. (Pa. St.) Horney v. Nixon, 520.

4. **THEATER TICKETS are Mere Licenses**, for the revocation of which, before the holder has actually been given his seat, and has taken it, the only remedy is an assumpsit for a breach of the contract implied from the sale of the ticket. (Pa. St.) Horney v. Nixon, 520.

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TIMBER.

See Injunction, 7, 8.

TITLE OF STATUTE.

See Statutes, 3, 4.

TRADE NAMES.

1. **TRADE NAMES—Use of the Name of a Person as Part of the Name of a Corporation.**—A body of associates organizing a corporation to manufacture and sell a particular product are not entitled to employ as their corporate name the name of one of their members, when such name is intentionally selected to compete with an established concern of the same name, engaged in the same business, to divert the latter's trade to themselves, by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. (N. J. Eq.) International Silver Co. v. William H. Rogers Corp., 506.

2. **TRADE NAMES—Similarity in, When Entitles Party to Relief.**—It is not essential to entitle a complainant to relief against one who assumes a trade name in a business in which the former has already acquired a trade reputation that the two names should be identical, or that buyers should be confused if they do not exercise a nice discrimination. The ground upon which the courts enjoin the use of a name is that it is likely to deceive. A nice discrimination is not to be expected from an ordinary purchaser. (N. J. Eq.) International Silver Co. v. William H. Rogers Corp., 506.

3. **TRADE NAME to Which the Complainant is not Entitled to the Exclusive Use.**—The fact that another besides the complainant has acquired some right to use a trade name does not prevent the complainant from maintaining a suit to enjoin the use of such name by a corporation having, as against him, no right to its use. (N. J. Eq.) International Silver Co. v. William H. Rogers Corp., 506.

4. **TRADE NAME Acquired When Unlawfully Using the Name of Another.**—The fact that a person has acquired some skill and experience while conducting business for the purpose of profiting by the trade reputation of another, does not, as against the latter, entitle a corporation in which the former becomes interested to adopt and use that name in the same business, though accompanied with additions sufficient to prevent a purchaser of nice discrimination from mistaking the goods of the one for those of the other. (N. J. Eq.) International Silver Co. v. William H. Rogers Corp., 506.

TRADE UNIONS.

1. **STRIKES.—Employés have a Right to Quit their employment** either singly or in a body, although their conduct in so doing involves a breach of contract. (Ill.) Franklin Union No. 4 v. People, 248.

2. **STRIKES—When Unlawful—Injunction.**—When the officers and members of a labor union agree together that by calling a strike, and by force, threats, intimidation, and picketing they will prevent the members of their employers' association from employing other workmen in their places, they enter upon an unlawful undertaking, the carrying into effect of which may be enjoined. (Ill.) Franklin Union No. 4 v. People, 248.

3. **STRIKES—Unlawful Conduct—Responsibility of Union.**—Where a labor union inaugurates a strike and sets in motion forces which produce intimidation, coercion, and violence, it cannot excuse itself by the statement of its officers that they advised the members of the union to be orderly and obey the law. (Ill.) Franklin Union No. 4 v. People, 248.

4. **STRIKES—Spying and Intimidation in Highway.**—A citizen must be accorded the right to go to and from his place of business or employment without interference; to follow him, to spy after him, to intimidate or coerce him are alike unlawful. (Ill.) Franklin Union No. 4 v. People, 248.

5. **STRIKES—Liability of Union for Unlawful Acts of Members.**—Where a labor union organizes and conducts a strike, through its officers, the organized entity or corporation can be reached and punished for the threats, intimidation, force, and violence which flow from the unlawful acts which it instigates its members to commit. (Ill.) Franklin Union No. 4 v. People, 248.

See Contempt.

TRADING STAMPS.

See Municipal Corporations, 8.

TRESPASS.

1. **TRESPASS—Damages.**—In an equitable action to recover land, to enjoin a trespass, and to recover damages against several defendants as trespassers, there is no error in refusing to charge that "if the evidence showed that the title and possession of the defendants was not joint, or failed to show that the acts of trespass complained of were not committed by them jointly, then there could be no recovery." (Ga.) Ivey v. Cowart, 160.

2. **TRESPASS—Damages.**—If several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. The jury may by their verdict specify the particular damages to be recovered of each, and judgment will then be entered severally. But the defendants are not entitled to have damages apportioned by the verdict. Some of the defendants may be found to be trespassers, and a recovery may be had against them, while some may be found not to be trespassers. (Ga.) Ivey v. Cowart, 160.

TRIAL.

1. **TRIAL PRACTICE.—Trial Courts have Power** and a very wide discretion to permit parties to withdraw from written stipulations waiving jury trial and submitting the case upon an agreed statement of facts to the court. (Fla.) Hartford Fire Ins. Co. v. Bedding, 118.

2. **TRIAL—Motion to Exclude Evidence.**—On a motion to exclude all of plaintiff's evidence, the court should be guided by what its action would be if the case were submitted to the jury and they should find a verdict in favor of the plaintiff upon such evidence. If it would be the duty of the court to set aside such verdict for want of sufficient evidence, it should sustain the motion and instruct the jury to find for the defendant; but if the evidence is such that the court must refuse to set aside the verdict, the motion to exclude the evidence should be overruled. (W. Va.) Cobb v. Glenn Boom and Lumber Co., 734.

3. **TRIAL.—Instructions** to the effect that if the jury believe that the defendant did not commit the crime it should acquit, are erroneous, and misleading, if given as an isolated proposition. (Fla.) McNish v. State, 65.

4. **TRIAL — Instructions.**—A request for an instruction, already covered by an instruction given, is properly denied. (S. C.) Milhous v. Southern Railway, 620.

5. **PRACTICE.—Finding Should Never be in the Form of a Résumé of the Evidence**, nor should they include matters of argument in support of the conclusions. (Wis.) Fanning v. Murphy, 946.

TROVER AND CONVERSION.

1. **TROVER AND CONVERSION—Draft for Collection—Sale of Goods.**—If a draft with a bill of lading attached is sent to a bank, with instructions to notify the shipper if the draft is not paid by the consignee, the bank cannot sell the goods to a third person without notice to the shipper without being guilty of conversion. (S. C.) Gregg v. Bank of Columbia, 633.

2. **CONVERSION BY PLEDGEE—Tender—Demand.**—If a pledgor has no notice of a conversion of pledged property by the pledgee and an application of the proceeds to the payment of the pledgor's debt until after the conversion, he may maintain an action for damages, without tender of the amount due, and a demand for the return of the property. (S. C.) Gregg v. Bank of Columbia, 633.

3. **CONVERSION—Equitable Relief.**—A person having a remedy by an action at law for conversion cannot maintain an equitable action for an accounting. (S. C.) Gregg v. Bank of Columbia, 633.

4. **CONVERSION—Measure of Damages.**—In cases of the conversion of property, the plaintiff is entitled to recover the highest market value up to the time of trial, and the jury may adopt such highest market value as the measure of damages. (S. C.) Gregg v. Bank of Columbia, 633.

TRUSTS.

Trust Funds.

See Banks and Banking, 3-5.

1. **TRUST FUNDS.**—The right to trace and charge money constituting a trust fund rests upon the right of property in the person bringing the action, and cannot rest upon the theory of preference by reason of an unlawful conversion. (Wis.) Boyle v. Northwestern Nat. Bank, 844.

Trust Deeds.

2. **TRUST DEEDS—Sales Under Aid of Equity.**—A trustee in a trust deed cannot resort to a court of equity to have a sale made under its decree instead of selling under the power contained in the trust deed, unless he shows such impediment to the exercise of the power

as renders it inequitable for him to proceed without the aid of the court. (W. Va.) George v. Zinn, 721.

3. TRUST DEEDS—Sales Under—Uncertainty of Liens—Aid of Equity.—The existence of liens, prior or subsequent, or both, on land to be sold under a trust deed, constitutes no impediment to the execution of the power of sale contained therein by the trustee without the aid of equity, unless such uncertainty, dispute or controversy as to the amounts or priorities of such liens is shown as may deter bidders from offering full and fair prices for the property. (W. Va.) George v. Zinn, 721.

4. TRUST DEEDS—Sales Under—Aid of Equity.—The possibility of a right of subrogation and marshaling of assets in the trust creditor desiring a sale under his deed of trust confers upon the trustee no right to the aid of a court of equity in the execution of the power of sale vested in him by the trust deed. (W. Va.) George v. Zinn, 721.

5. TRUST DEEDS—Powers of Trustee.—The powers of a trustee under a trust deed are limited and defined by the instrument under which he acts, and he has only such powers as are thus expressly conferred upon him, together with such incidental and implied powers as are necessarily included therein. He does not control the debt secured nor represent the creditor for all purposes in the collection of the debt, nor can he assert the equities, rights, and powers of such creditor against other creditors. (W. Va.) George v. Zinn, 721.

VENDOR AND VENDEE.

1. OPTION TO PURCHASE.—An Agreement in a Lease granting the lessee the privilege of purchasing the premises within a stated period upon specific terms is regarded as a continuing offer to sell which cannot be revoked during the period prescribed for the exercise of the option. If no other consideration is stated or shown, the lease itself, with the affirmative covenants of the lessee, is considered a sufficient consideration for the agreement to convey at the lessee's option. (Wyo.) Frank v. Stratford-Handcock, 963.

2. OPTION TO PURCHASE—Effect of Acceptance.—When an option, given upon a consideration, is accepted within the time allowed, and according to its terms, the offer and acceptance constitute a contract of sale; and the same result flows from the acceptance of an offer without consideration, if accepted before the offer is withdrawn or revoked. (Wyo.) Frank v. Stratford-Handcock, 963.

3. OPTION TO PURCHASE—Right to Possession.—The holder of a mere option to purchase land is not entitled to possession, in the absence of an express stipulation to that effect, at least until he has tendered the purchase price and demanded a deed. (Wyo.) Frank v. Stratford-Handcock, 963.

4. OPTION TO PURCHASE—Lease as Consideration.—A lease which does not become operative because the lessee fails to perform a condition precedent cannot serve as a consideration for an option therein given the lessee to purchase the premises during the term, and the lessor may therefore revoke the option at any time before acceptance. (Wyo.) Frank v. Stratford-Handcock, 963.

5. OPTION TO PURCHASE—Revocation by Conveyance.—Where a lessor gives his lessee an option to purchase the premises during the term, but the lease, which is the sole consideration for the option, does not become operative because of the failure of the lessee to perform a condition precedent, a bona fide conveyance of the property by the lessor to a third person, brought to the knowledge of the lessee

before any attempted acceptance of the option, amounts to a revocation of it. (Wyo.) Frank v. Stratford-Handcock, 963.

6. OPTION TO PURCHASE—Revocation or Withdrawal.—An optional agreement to convey land, made upon proper consideration, cannot be revoked by the vendor within the period granted for the exercise of the option, but a mere proposal, without consideration, may be withdrawn at any time before acceptance. (Wyo.) Frank v. Stratford-Handcock, 963.

See Deeds; Records.

VENUE.

CRIMINAL LAW—Venue—Division of County.—A criminal case involving an offense committed in the territory of a new county, which was pending in a court of the old county at the time that the new one was created by dividing the old cannot be properly tried in the court of the old county, and the defendant has a right to demand that he be tried in the new county in which the crime was committed, and by proper proceeding he is entitled to have the case transferred to that county for trial. (Ga.) Pope v. State, 197.

VICE-PRINCIPAL.

See Master and Servant, 3-5.

WATERS AND WATERCOURSES.

In General.

1. SURFACE WATER.—Every landed proprietor has the right to take any measures necessary to the protection of his property from surface water, even if in so doing he throws it back upon a coterminous proprietor. (S. C.) Johnson v. Southern Railway, 572.

2. WATER RIGHTS—Change of Place of Diversion.—There is nothing in the law of prior appropriation that prevents a change of the place of diversion, if it can be accomplished without injury to others. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

3. WATER RIGHTS—Use During Alternate Weeks by Co-owners. An agreement in a deed of an undivided interest in a water right, providing for the use of all the water by the grantor and grantee on alternate weeks respectively, is not in itself objectionable. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

4. WATER RIGHTS.—The Only Property in the Water owned by an appropriator is a right to use it as measured by his appropriation. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

Sale of Water Right.

5. WATER RIGHTS—Property Rights Therein.—The right to use the water of a stream, based upon a prior appropriation thereof for beneficial purposes, is a property right, and as such is susceptible of transfer. (Wyo.) Johnston v. Little Horse Creek etc Co., 986.

6. WATER RIGHTS—Sale of Water.—An appropriator of water for irrigation cannot sell surplus water which he does not need; all that he can sell is his water right. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

7. WATER RIGHTS—Sale Separate from Land.—A water right may be sold separate from the land, provided other appropriators are not injuriously affected thereby—that is, provided the burden upon the use is not enlarged beyond that which rested on it in the hands of the original appropriator as he was entitled to and did use it. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

8. **WATER RIGHTS—Sale Separate from Land—In the Statutes** of Wyoming there is no express or implied prohibition against the sale of a water right separate from the land to which it is appurtenant. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

9. **WATER RIGHTS—Effect of Their Sale.**—When a water right is sold separate from the land, it does not become a mere floating right. It becomes appurtenant to other land, if it is intended by the grantee for irrigation, or else is devoted to other equally beneficial uses. Without some beneficial use after the sale, it will be held abandoned, as in the case of an original appropriator who intentionally ceases to use it. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

10. **WATER RIGHTS—Effect of Transfer of Undivided Interest.**—Upon the sale of an undivided one-half interest in a water right, the grantor and grantee stand in relation to each other the same as if they originally had made a joint appropriation. (Wyo.) Johnston v. Little Horse Creek etc. Co., 986.

See Municipal Corporations, 16, 17.

WILLS.

Witnesses and Attestation.

1. **WILLS—Witnesses, Competency of Persons Who will be Benefited.**—Where it is claimed that an earlier will was revoked by a later, persons who would take as heirs or next of kin but for the earlier will are competent, as witnesses, to testify to conversations with the testator, including his statements and declarations respecting the execution of the will, but evidence of such declarations should be scrutinized carefully. (Neb.) Williams v. Miles, 431.

2. **WILLS—Attestation Clause.**—An attestation clause is not required to a will. Therefore, subscribing witnesses to a will may testify that the testator signed and they witnessed and subscribed in the manner prescribed without proving that there was any attestation clause or establishing the contents thereof. (Neb.) Williams v. Miles, 431.

Construction and Interpretation.

3. **WILLS—Construction.**—Whenever the words of a will fairly construed, are such as to carry the whole estate, it will be presumed that the testator intended to dispose of all his property and not to die intestate as to any part of it; but the intention to pass the whole estate must be expressed in some form, and such presumption will not prevail when the language of the will, fairly construed, is insufficient to carry the whole estate. (Wis.) Gallagher v. McKeague, 821.

4. **WILLS—Construction—"Effects."**—If a testator in the disposing part of his will enumerates particular kinds of chattels, such as household goods, and couples with them the words "and effects," or equivalent words, the generality of his expression is to be restricted to such species of property as are ejusdem generis with the particular words. (Wis.) Gallagher v. McKeague, 821.

5. **WILLS.—The Term "Children"** is primarily a word of purchase, and is not to be construed as equivalent to "heirs," in the absence of other words or circumstances showing it to have been used in that sense. (Ill.) Strawbridge v. Strawbridge, 226.

6. **WILLS.—The Words "Heirs," "Issue," and "Children,"** when found in wills, may be construed interchangeably, when necessary to effectuate the intention of the testator. (Ill.) Strawbridge v. Strawbridge, 226.

7. **WILLS—Vesting Fee in the First Donee.—Courts favor that** construction of a will which gives an estate of inheritance to the first donee. (Ill.) Strawbridge v. Strawbridge, 226.

8. **WILLS—Devise of Fee—Words Qualifying.—A devise of a fee** simple estate will not be qualified or limited by other parts of the will, unless they show a clear intention to that effect on the part of the testator. (Ill.) Strawbridge v. Strawbridge, 226.

9. **WILLS.—A Testator is Presumed to have Intended to pro**vide for the disposition of his entire estate. (Ill.) Strawbridge v. Strawbridge, 226.

10. **WILLS—"Children" Construed as "Heirs."—**Where a testator devises his real property to his wife for life, and then gives all the residue of his estate to his "children," to be divided among them equally, naming them, "and to their children forever," the title in fee to the remainder passes to the children of the testator, when such appears to have been his intention as gathered from the language of the will, viewed in the light of the circumstances surrounding him at the time of the execution of the instrument. (Ill.) Strawbridge v. Strawbridge, 226.

Rule in Shelley's Case.

11. **WILLS.—Under the Rule in Shelley's Case, a devise to the** wife of the testator, "to hold and to have to her, and to her heirs and assigns forever, but if she gets married again, then at the time of her second marriage, one-half to be sold and divided as follows," vests the fee in the widow. (Ill.) Rissman v. Wierth, 243.

12. **WILLS.—The Application of the Rule in Shelley's Case to any** particular case depends not upon the quantity of estate intended to be given to the ancestor, but upon the estate devised to the heir. (Ill.) Rissman v. Wierth, 243.

13. **WILLS.—The Rule in Shelley's Case is not confined to cases** where, by the express language of the testator, a freehold estate is created in the ancestor. (Ill.) Rissman v. Wierth, 243.

14. **WILLS.—Where the Rule in Shelley's Case applies, the sub**sequent expressed intention of the testator to the contrary can have no effect. (Ill.) Rissman v. Wierth, 243.

Restraint of Marriage.

15. **WILLS—Gift in Restraint of Marriage.—If a person is by** will given the income of a fund during her natural life, or so long as she remains unmarried, with a gift over in case of her death or marriage, the gift is upon a limitation in favor of the beneficiary during the period she remains unmarried, and is not unlawful nor invalid as a condition in restraint of marriage. (Pa. St.) Holbrook's Estate, 537.

Codicils.

16. **WILLS—Codicils—Construction and Effect.—A will and a** codicil affixed thereto must be regarded as parts of the same instrument, and the codicil will not be allowed to vary or modify the will, unless such is the plain intent of the testator. (Pa. St.) Sigel's Estate, 515.

17. **WILLS—Codicils—Construction and Effect.—A gift once made** by will is not to be cut down by a subsequent codicil unless the intention of the testator to that effect appears clearly or by necessary implication. (Pa. St.) Sigel's Estate, 515.

18. **WILLS—Codicils—Construction and Effect.—If a gift of an** estate is made by will, a revocation by codicil or otherwise will not

be implied unless no other construction can be placed upon the language. (Pa. St.) Sigel's Estate, 515.

19. **WILLS—Codicils—Construction and Effect.**—If a testator, after making several legacies, by his will gives the residue of his estate to his heirs, and on the same day executes a codicil giving a certain sum "and no more" to three named persons, who are his heirs, the latter are not excluded by the words "no more" from sharing in the residue of the estate, as such words apply only to the amounts named in the codicil. (Pa. St.) Sigel's Estate, 515.

Lost Will.

20. **WILL, Lost, Evidence of, When Sufficient to Show Revocation of Prior Will.**—Where parol evidence is relied upon to show that a will in existence was revoked by implication by a prior one, which cannot be found, such evidence should be clear, unequivocal, and convincing, and the contents of the latter will must be so far disclosed that the court may know that if both wills were before it, the two might not be harmonized in whole or in part. (Neb.) Williams v. Miles, 431.

21. **WILL, LOST—Declaration of Testator, Competency of.**—The contents of a lost will cannot be proved solely by the declarations of the testator, but they are admissible to corroborate more direct evidence of the contents of the will and to prove its existence. (Neb.) Williams v. Miles, 431.

Destruction, Revocation, and Revivor.

22. **WILLS, Presumption of Destruction of.**—If a will is shown to have been made and left in the custody of the testator and cannot be found after his death, it is presumed to have been destroyed by him with the intent of revoking it. (Neb.) Williams v. Miles, 431.

23. **WILLS, Presumption of Destruction of, When not in the Testator's Custody.**—If a will is traced out of the testator's custody and cannot be found after his death, the burden is on him who asserts a revocation to show that it came once more under the testator's control and was destroyed by his direction. (Neb.) Williams v. Miles, 431.

24. **WILLS—Presumption of Destruction of, When not Conclusive.** Though a will which was in the possession of the testator and cannot be found after his death is presumed to have been destroyed by him with intent to revoke it, this presumption is one of fact only, to govern in the absence of circumstances tending to a different conclusion, and may be overcome by circumstantial or other evidence to the contrary. (Neb.) Williams v. Miles, 431.

25. **WILLS, Revivor of Earlier by Destruction of Later—Presumption.**—If a will is executed which revokes a prior will, either expressly or by implication, and the latter will is itself revoked by its destruction by the testator, the former will, though preserved, is not thereby revived unless such appears to have been the intention of the testator, to be deduced from all the circumstances. So far as there is any presumption, it seems to be against the revivor. (Neb.) Williams v. Miles, 431.

26. **WILLS—Revocation of One by Another, Sufficiency of Evidence of.**—To establish the revocation of one will by another it must be shown not merely that there was a new and later will, but also that it contained a clause of revocation, or its contents must be proved so as to establish an inconsistency between the instruments requiring the court to hold that the one revoked the other by implication. (Neb.) Williams v. Miles, 431.

27. **WILLS, Revivor of One by Another.**—Where a later will does not contain any express clause of revocation, a former will is revived only so far as inconsistent with the later. A complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. (Neb.) Williams v. Miles, 431.

28. **WILLS.—The Declarations of a Testator After the Execution of His Will are Admissible** to rebut the presumption arising from its not being found after his death that it was destroyed by him with intent to revoke it. (Neb.) Williams v. Miles, 431.

29. **WILLS—Declarations of a Testator to Show that One Will Revoked Another.**—The contents of a lost or destroyed will, whether with respect to a clause of revocation or to general provisions from which the revocation of the will is to be implied, cannot be shown solely by the declarations of a testator. (Neb.) Williams v. Miles, 431.

30. **WILLS, Sufficiency of Evidence of Contents of a Later Which is Claimed to Revoke an Earlier.**—A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating the probate of such prior will, although, by reason of its loss or destruction, the exact dispositions made therein cannot be shown, and are hence incapable of execution. It is enough to prove that the lost will revoked the former one. If that much is proved, the contents need not be further shown. (Neb.) Williams v. Miles, 431.

31. **WILLS, Revocation of One by Another—Burden of Proof.**—The burden is upon those who attack the earlier will to show that it was revoked by a subsequent will, and if they do not establish an express revocatory clause, conjecture and probability are not sufficient; nor will the words, "This is my last will," have any weight whatever. (Neb.) Williams v. Miles, 431.

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WITNESSES.

1. **WITNESS—Incriminating Question—Waiver.**—The right of a witness in a criminal trial to refuse to answer incriminating questions is a personal privilege which he may exercise or waive; if he chooses to answer them, neither he nor his counsel can legally object. (Utah) State v. Shockley, 639.

2. **WITNESS—Accused in Criminal Case—Exercise of Privilege through Counsel.**—Where the defendant in a criminal prosecution takes the stand in his own behalf, he does not, for the time being, forfeit his constitutional right to the assistance of counsel; and if incriminating questions are put to him, he need not personally make objection and claim his privilege, but may claim his immunity through his counsel. (Utah) State v. Shockley, 639.

3. **WITNESS—Accused in Criminal Case—Cross-examination as to Other Crimes.**—When a person on trial for a criminal offense testifies in his own behalf, it is a prejudicial abuse of discretion to permit the state, over his objection, to interrogate him respecting his commission of other crimes in no way connected with the one for which he is being tried, unless the questions relate to offenses for which he has been convicted, and then only for the purpose of affecting his credibility. (Utah) State v. Shockley, 639.

See Evidence.

WRIT OF PROHIBITION.

See Prohibition, Writ of.

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